No. 14714

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Appellant

v.

AHTANUM IRRIGATION DISTRICT, a corporation, et al.,
Appellees.

No. 14714

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

BRIEF OF APPELLEES

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BRIEF FOR THE AHTANUM IRRIGATION DISTRICT, A CORPORATION, ET AL., APPELLEES, AND FOR THE FEDERAL LAND BANK OF SPOKANE, A CORPORATION, APPELLEE

OPINION BELOW

The opinion of the trial court was entered March 7, 1953. It was amended and supplemented January 18, 1954.[1] By stipulation the opinion was omitted from the record. It is reprinted and submitted as Appendix A to brief of Intervenor the State of Washington for the convenience of Court and counsel. The references to the opinion throughout this brief are to the pages in the reported opinion appearing in 124 F. Supp. 818.

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[1] United States vs. Ahtanum Irrigation District, et al., 124 F. Supp. 818 (U.S.D.C.E.D. Wash. S.D. 1954)

JURISDICTION

The jurisdiction of the United States District Court was invoked by the United States of America pursuant to the act which provides that: " * * * the district courts shall have original jurisdiction of all civil actions, suits or proceedings commenced by the United States. * * * "[2] Jurisdiction to review the judgment below has been conferred upon this court by Congress.[3]

THE TREATY, CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Treaty of June 9, 1855 between the United States of America and the Yakima Tribe of Indians is involved in this case.[4]

The constitutional provision dealing with the Indian Tribe[5] and the extent of authority conferred by the Acts of Congress,[6] the Enabling Act for the State of Washington and the Constitution of the State of Washington are before the Court for interpretation.[7]

The Acts of 1866 and 1870[8] and the Desert Land Act of 1877[9] are likewise involved. They provide for the

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[2] 28 U.S.C.A. 1345.
[3] 28 U.S.C.A. 1291.
[4] 12 Stat. 951, 11 Kapler 698; R. 16, and Plaintiff's Ex. 1.
[5] U. S. Constitution, Article 1, Section 8, Clause 3.
[6] 25 U.S.C. 2, 381 and 382.
[7] Enabling Act, Section 4, 25 Stat. 676. Constitution of the State of Washington, Article 21, Section 1.
[8] 43 U.S.C. 661.
[9] 43 U.S.C. 321.

appropriation of the right to use of water on public lands.

Likewise involved are the original Act authorizing the appropriation of water in Yakima County,[10] the statutes of the State of Washington authorizing appropriation of the right to the use of water,[11] the State Water Code, and the Federal Reclamation Act of 1902.[12]

COUNTERSTATEMENT OF THE CASE

(a) THE TREATY OF 1855

By a Treaty dated June 9, 1855, between the United States of America and the Yakima Indians, an area now comprising a large portion of the State of Washington was ceded to the United States. The balance of the lands comprising over a million acres and containing valuable timber, fishing and hunting grounds, was retained by the Yakima Indians.[13]

The northern boundary of the reserved area now comprising the Yakima Indian Reservation is described in part as:

> "Commencing on the Yakima River, at the mouth of Attahnam River; thence westerly along said Attahnam River to the forks; thence along the southern tributary * * * "[14]

The Treaty makes no mention of the right to the

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10 Washington Session Laws 1873, page 520.

11 Chapter 117 Session Laws of 1917, also found in R.C.W. 90.04.020.

12 U. S. Reclamation Act 1902, 32 Stat. 388.

13 Pre Trial Order, R. 123, Plaintiff's Ex. 1, 9 and 10.

14 R. 18.

use of water for irrigation. There is reserved the right to hunt and fish.[15] Other waters entirely on the reservation were ample to furnish all of the irrigation needed for the farm lands on the Ahtanum Creek in the reservation.[16]

The Yakima River borders the Yakima Indian Reservation and substantial quantities of water are taken from the Yakima River for the Wapato Project.[17]

(b) AHTANUM CREEK

Ahtanum Creek is a non navigable stream flowing east and slightly north from the Cascade Mountains, all in Yakima County. There are two forks, the south fork is the north boundary of the Yakima Indian Reservation and is the smaller of the two. The north fork, containing approximately three-fourths of the flow of the stream, originates entirely off the Yakima Indian Reservation and joins the south fork to form the main channel.[18]

Ahtanum Creek flows on the south side of the valley floor where there is a well defined channel. The stream forms several branches and several islands on the north side below the narrows.[18]

In about 1847 the Catholic Mission located on the north side of Ahtanum Creek utilized water from the creek for irrigation.[19]

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15 R. 20.
16 R. 129, R. 449-452.
17 38 Stat. 604.
18 Pltf. Ex. 5 F 1.
19 Pltf. Ex. 12.

The property on the north side was developed by white settlers and was patented in fee by the United States of America. There was no reservation of water rights in the patents except riparian rights and such rights as had been acquired under the Desert Land Act.[20]

The lands on the south side of Ahtanum Creek were allotted to the Indians and certain trust patents and fee patents were issued.[21]

925.45 acres of irrigated land on the Indian side were patented in fee more than ten years before this case was started.[22]

There is not sufficient water in Ahtanum Creek to irrigate the land on both sides of the creek now partially irrigated.[23]

(c) MUNN vs. REDMAN AND THE GOVERNMENT'S PROPOSED BILL IN EQUITY

In 1906 there was a shortage of water in Ahtanum Creek. An injunction action was commenced against Mr. Redman, the then Indian Service Engineer. About 1902 the Indian Irrigation Service had commenced the enlargement of the existing diversion ditches on the Reservation Side of Ahtanum Creek and continued this construction until the shortage of 1906.[24] While the action

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20 Defendant's Exhibit 141, 142, 142 A.
21 Pltf. Ex. 4B and D, R. 129.
22 R. 129.
23 R. 129.
24 R. 415.

was for injunction brought by H. J. Snively, Attorney of Yakima representing the plaintiff, David Munn, the action was primarily for the purpose of settling the division of the water of Ahtanum Creek.[25]

Mr. A. G. Avery, United States Attorney at Spokane, Washington, appeared as attorney for the defendant, Redman, the Indian Service Engineer. This appearance was at the instance of the Attorney General.[26] On May 11, 1907, Mr. Avery wrote Mr. Snively pointing out that the court action would not solve the water problems on Ahtanum Creek because of the nature of the rights involved and suggested a Federal Court proceeding.[27] On May 18, 1907, Mr. Snively, attorney for the plaintiff, wrote Avery that he would dismiss the case of *Munn vs. Redman* provided Avery would immediately file a bill in equity on behalf of the United States so that all questions of the right to the waters of Ahtanum Creek could be determined.[28] On May 21, 1907, Mr. Avery replied that he could not get approval from the Attorney General's Office as fast as requested and that inasmuch as questions of law only would be involved, it could be taken up later.[29] On July 30, 1907, the Attorney General wrote to Mr. Avery and returned the signed bill in equity as prepared

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[25] Pltf. Ex. 8.

[26] Pltf. Ex. 11-2, 11-3, 11-5. (Pertinent excerpts of exhibits are arranged in chronological order and printed as Appendix "B" to this brief.)

[27] Plaintiff's Exhibit 11-113 "I"; Appendix P. 7.

[28] Plaintiff's Exhibit 11-113 "J"; Appendix P. 8-9.

[29] Plaintiff's Exhibit 11-113 "K"; Appendix P. 11.

and directed him to proceed to determine the names of the proposed defendants and stated that the object of the action was "the settlement of the use of the water of Attah-num Creek, Washington."[30]

The Department of Justice wired the United States Attorney at Spokane on August 12, 1907 to withhold the filing of the Government's Bill in equity.[31] At this time the Winters case had been decided in the United States Court of Appeals for the Ninth Circuit.[32] Likewise the Winters case was on appeal to the Supreme Court of the United States, and the Attorney General's office who directed that the District Attorney hold up the filing of the bill in equity represented the United States on the appeal in the Winters case. It was argued in the fall of 1907, and decided by the Supreme Court of the United States on January 6, 1908.

The Attorney General's action in withholding the filing of the proposed bill in equity to settle the rights of the water users in Ahtanum Creek is explained by the concurrent activities by the then Secretary of the Interior, James Rudolph Garfield. He appeared personally in Yakima County.[33] He conferred with officials of the Indian Service and the United States Attorney's Office and met with owners of land on the north side of Ahtanum

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30 Plaintiff's Exhibit 11-14; Appendix P. 12.
31 Plaintiff's Exhibit 11-17; Appendix P. 13.
32 Winters vs. United States, C.C.A. 9 (1906), 143 F. 740; Winters vs. United States, C.C.A. 9 (1906) 148 F. 684.
33 R. 547, 548.

Creek. The Secretary of the Interior expressed the desire that the situation called for a settlement by agreement rather than by litigation.[34] He further promised to send the Chief Engineer of the Indian Irrigation Service, Mr. W. H. Code, to make a field investigation and report his findings.

The case of *Munn vs. Redman* was filed as the initial step in the contemplated settlement of the controversy, the Government was invited to file a bill in equity to settle all matters and it declined to do so. The matter then proceeded to settlement, both parties being presumed to have in mind the decision in the case of *Winters vs. United States.*[35]

(d) AGREEMENT OF MAY 9, 1908

From the above correspondence between Mr. Snively, who in fact was representing all of the non-reservation owners north of the Creek, and the United States Attorney, it is obvious that Mr. Snively was demanding that the water rights problem on Ahtanum Creek be settled by litigation either in the case initiated by him in behalf of Mr. Munn or by an action commenced by the Government in Federal Court. The withholding of the proposed litigation was a deliberate course of conduct chosen by the United States Attorney General which finally cul-

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[34] Plaintiff's Exhibit 11-6.
[35] Winters vs. United States (Jan. 6, 1908) 207 U. S. 564.

minated in the Agreement of 1908 negotiated in the utmost of good faith by all parties concerned.[36]

The agreement, including the names of all participating parties that acted through their attorneys in fact appears as Plaintiff's Exhibit 11-27.[37]

Subsequent to the visit of Secretary Garfield[38] and pursuant to the direction of the Secretary, Chief Engineer Code of the Indian Service visited the Yakima Reservation in August of 1907 and caused to be made certain field surveys which he later included in a comprehensive report to Secretary Garfield.[39] Thereafter meetings were held with the non-reservation owners, with Mr. Avery, the United States attorney, participating in all of the meetings representing the United States. It became apparent that it was impossible for the negotiators to make any progress in view of the fact that the non-reservation owners were not organized and that each owner had to be dealt with separately.[40]

During this period the report by Chief Engineer Code had been forwarded to the Commissioner of Indian Affairs by Secretary Garfield and was approved by the Com-

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[36] Plaintiff's Exhibit 11-17; Appendix P. 13.

[37] The Agreement omitting the names of the parties acting through their attorneys in fact is found in the Appendix A, page 1 et. seq., and in R. 26.

[38] The then Secretary of Interior, referred to in Appellant's brief as a subordinate official, was the son of former President James A. Garfield.

[39] Plaintiff's Exhibit 11-6; Appendix P. 14.

[40] R. 548 and 549.

missioner of Indian Affairs.[41] It was determined that the only way negotiations could proceed in an orderly manner was by the organization of a committee composed of non-reservation owners who would have the power to act for all of the other people on the north side of the Creek. Powers of attorney were then prepared by Mr. Snively and Mr. Avery and considerable time was consumed in securing all of the necessary signatures to these powers of attorney.[42] The powers of attorney were further specifically required by Secretary Garfield and he put a time limit for the consummation of this phase of the negotiations of March 15, 1908 in a letter to Mr. Snively.[43]

Again, it is interesting to note that at this time the Winters case[44] had been decided by the United States Supreme Court and the negotiating Government officials were undoubtedly aware of this case and other cases dealing with Indian water rights.[45]

The powers of attorney were eventually secured satisfactory in form to Mr. Avery and Mr. Snively[46] and the Commissioner of Indian Affairs was so notified by letter of April 9, 1908 from the Yakima Indian Reserva-

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41 Plaintiff's Exhibit 11-6; Appendix P. 18, and Plaintiff's Exhibit 11-18; Appendix P. 19.

42 R. 551.

43 Plaintiff's Exhibit 11-113 "L"; Appendix P. 23.

44 Winters vs. U. S., 207 U. S. 564.

45 Plaintiff's Exhibit 11-6; Appendix P. 14. Conrad Investment Company vs. United States, 161 Fed. 829.

46 R. 551.

tion Superintendent. Request was further made at this time that Mr. Code be directed to come out and proceed with the negotiations.[47] Chief Engineer Code was so directed upon April 13, 1908 by Secretary Garfield and he was given specific orders which in substance required him to secure an agreement, if possible, for a division of the low water flow of the Creek based upon one-third to the Reservation side and two-thirds to the non-reservation side, but if that basis could not be secured, then the agreement should be based upon the present irrigated acreage on both sides of the creek.[48] Chief Engineer Code's report of October 17, 1907 to the Secretary had indicated that the irrigated acreage of Indian lands south of the Creek was 1500 acres and that the non-reservation irrigated acreage north of the creek was 5500 acres.[49]

The agreement was negotiated after first being transmitted by Chief Engineer Code to Secretary Garfield and the form of the agreement received the specific approval of both Secretary Garfield and the Commissioner of Indian Affairs as finally consummated.[50] It was signed by Chief Engineer Code on behalf of the United States and by the Water Users' Committee on May 9, 1908,[51] and was later on June 30, 1908 approved by Frank Pierce, First Assistant Secretary of Interior. After being again spe-

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47 Plaintiff's Exhibit 11-21; Appendix P. 25.
48 Plaintiff's Exhibit 11-23; Appendix P. 27.
49 Plaintiff's Exhibit 11-6; Appendix P. 14.
50 Plaintiff's Exhibits 11-25 and 11-26; Appendix P. 30-31.
51 R. 555.

cifically approved by the Office of Indian Affairs[52] the agreement was on June 27, 1908, referred to the Secretary of Interior for his approval, and as above mentioned, resulted in the approval of the Agreement by the First Assistant Secretary. We cannot see how the plaintiff in the face of the above facts can make its contention that the agreement of 1908 was illegal and entered into by unauthorized subordinate officials of the Department of Interior.[53] Secretary of Interior Garfield and the Office of the Commissioner of Indian Affairs were at all times cognizant of every step taken in securing the agreement and approved each step.

(e) STATE ADJUDICATION

With the knowledge and consent of the Department of Interior the State of Washington in 1925 commenced a proceeding in Yakima County for the adjudication of the water rights of the owners on the north side of Ahtanum Creek. It was a proceeding in equity brought under the State Water Code.[54] The rights of 216 claimants and landowners were involved and a hearing was held by the lower court with the State Supervisor of Hydraulics acting as a Referee. The landowners were classified into thirty groups according to the dates of initiation of their respective water rights. The trial court after

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52 Plaintiff's Exhibit 11-28; Appendix P. 32.

53 Plaintiff's Brief, page 21.

54 Chapter 117, Session Laws of Washington of 1917, page 447.

considering the findings and recommendations of the Supervisor acting as referee, heard exceptions thereon and divided the water users into 31 classifications or groups. Some of these water users feeling aggrieved, appealed the case and the Supreme Court of the State of Washington affirmed the trial court in its complete adjudication of 75% of the waters of Ahtanum Creek pursuant to the 1908 Agreement.[55] The users of the water on the north side have acted under this decree ever since and are now dividing 75% of the waters on the north side in accordance therewith.[56]

Notwithstanding the 1908 Agreement and the State adjudication above referred to, the appellant commenced this action on July 2, 1947, seeking the entire flow of Ahtanum Creek on behalf of the Yakima Tribe of Indians. In appellant's complaint[57] it seeks specifically 75 cubic feet per second during the month of June each year, 66 cubic feet per second during the month of July each year, and 38 cubic feet per second during the month of August each year from the waters of Ahtanum Creek. From the official records of the United States Geological Survey it appears that the minimum flow of Ahtanum Creek during 1947 for the month of June was 62 cfs., for the month of July was 35 cfs., for August was 24 cfs. In 1945 the minimum flow in June was 53 cfs., in July was

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55 In re Ahtanum Creek, 139 Wash. 84; 245 Pac. 758.
56 R. 515.
57 R. 8, 9 and 10.

23 cfs., in August was 17 cfs. In 1944 the minimum flow in June was 32 cfs., in July 18 cfs., in August 13 cfs. In 1941 the minimum flow for June was 43 cfs., for July was 20 cfs., for August was 18 cfs. In 1940 the minimum flow for June was 47 cfs., for July was 26 cfs., for August was 18 cfs. In 1939 the minimum flow for June was 47 cfs., for July 19 cfs., for August 16 cfs.[58]

It is only in exceptional water years that there is sufficient water during the low flow in Ahtanum Creek to equal the quantity asked by the appellant. Of course, this would assume the diversion of no waters upon the 10,000 acres lying north of the creek and belonging to the appellees.

STATEMENT OF THE ISSUES

Is the agreement of 1908 dividing the waters of Ahtanum Creek a binding agreement on the United States, representing the Yakima Indian tribe, and the water users on the north side of the Creek?

Does the adjudication of 75% of the waters of Ahtanum Creek by the State of Washington under the State Water Code bind the appellant and its ward and are they barred by laches and estoppel from contesting the original contract of 1908 and the State adjudication?

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[58] Plaintiff's Exhibit 4 E, Pre-trial order Exhibit B, Appendix B of Appellant's brief, Page 75 and 77. Note: That the minimum flow of the north fork of Ahtanum Creek and the south fork of Ahtanum Creek have to be added to get the total flow.

Was the dismissal of the plaintiff's claim a correct disposition of the action?

Is the appellant entitled to an injunction against anyone using any portion of the flow of Ahtanum Creek and can the appellant as trustee for the Yakima Indian nation now claim the entire flow under the Treaty of 1855?

SUMMARY OF THE ARGUMENT

The contract of 1908 is a valid and binding agreement limiting the reservation lands to 25% of the normal flow of Ahtanum Creek and by administrative interpretation has been so recognized. Likewise the appellant is estopped from questioning the validity of the contract by reason of long acquiescence, estoppel and laches.

The State of Washington under the State Water Code commenced adjudication of the rights of the respective landowners in and to 75% of the flow of Ahtanum Creek and the adjudication was commenced with the knowledge and consent of the appellant and its agents, which constitutes an adjudication vesting in those persons participating in such adjudication a good title to the waters so adjudicated.

The appellant has sought to invalidate the agreement of 1908 and to set aside and nullify the State adjudication. The trial court's denial of such right constituted authority for entering a dismissal of plaintiff's claim.

The Treaty of 1855 reserved no waters for irriga-

tion, but, if any such reservation is held to exist, then the agreement of 1908 provided waters for the Indians under the Winters case and the decisions following it.

ARGUMENT

(a) VALIDITY OF 1908 AGREEMENT

It is contended by the appellant that the agreement is invalid and of no force and effect. We pass for the moment the ethics involved in the Government's position as well as its standing in equity by the assertion that its own agreement negotiated at the time with the utmost of good faith is now invalid. Appellees vigorously assert that the agreement is in all respects valid and that the Secretary of Interior acting by and through his Agent, Chief Engineer Code, did have the power and authority to enter into a binding agreement limiting the water for both the Reservation and non-reservation people.

It is provided under Duties of the Commissioner of Indian Affairs as follows:

> "Section 2. Duties of Commissioner. The Commissioner of Indian Affairs shall, under the direction of the Secretary of the Interior, and agreeably to such regulations as the President may prescribe, have the management of all Indian Affairs and of all matters arising out of Indian relations."[59]

It is further provided with reference to irrigation of Indian lands as follows:

"Section 381. Irrigation lands; Regulation of use of

[59] 25 U.S.C.A., Sec. 2, page 4; R. S. Sec. 463.

Water. In cases where the use of water for irrigation is necessary to render the lands within any Indian Reservation available for agricultural purposes, the Secretary of the Interior is authorized to prescribe such rules and regulations as he may deem necessary to secure a just and equal distribution thereof among the Indians residing upon any such reservations; and no other appropriation or grant of water by any riparian proprietor shall be authorized or permitted to the damage of any other riparian proprietor.[60]

It is further provided concerning irrigation projects under the Reclamation Act that:

"Sec. 382. Irrigation projects under Reclamation Act. In carrying out any irrigation project which may be undertaken under the provisions of sections 372, 373, 381, 383, 391, 392, 411, 416, 419, 421, 431, 432, 434, 439, 461, 476, 491 and 498 of Title 43, Public Lands, and which may make possible, and provide for in connection with the reclamation of other lands, the irrigation of all or any part of the irrigable lands heretofore included in allotments made to Indians under section 334 of this title, the Secretary of the Interior is authorized to make such arrangement and agreement in reference thereto as said Secretary deems for the best interest of the Indians; Provided, that no lien or charge for construction, operation, or maintenance shall thereby be created against any such lands."[61]

In interpreting these statutes it has been held that the Commissioner of Indian Affairs has very broad powers in the management of all Indian Affairs.[62]

For the Departments of Government to act necessarily

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[60] 25 U.S.C.A., Sec. 381; page 321; 24 Stats. 392.
[60] 25 U.S.C.A. Sec. 381; page 321; 24 Stats. 390.
[61] 25 U.S.C.A. Sec. 382; page 322; 35 Stats. 798.

the powers of discretion must be exercised and it is not necessary that the head of a Department must show statutory provision for everything he does.[63]

In interpreting Section 381, it has been held that the Secretary of the Interior had the power to prescribe rules and regulations with reference to water as between a patentee of an original Indian allotment and other lands in the Indian Reservation not patented. In this case the

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in it was stated: "In our opinion the very general language of the statutes makes it quite plain the the authority conferred upon the Commissioner of Indian Affairs was intended to be sufficiently comprehensive to enable him, agreeably to the laws of Congress and to the supervision of the President and the Secretary of the Interior, to manage all Indian affairs, and all matters arising out of Indian relations, with a just regard, not merely to the rights and welfare of the public, but also to the rights and welfare of the Indians, and to the duty of care and protection owing to them by reason of their state of dependency and tutelage."

[63] United States vs. McDaniel, 7 Pet. 1; 8 Law Ed. 587, wherein it is stated: "A practical knowledge of the action of any one of the great departments of the government must convince every person that the head of a department, in the distribution of its duties and responsibilities, is often compelled to exercise his discretion. He is limited in the exercise of his powers by the law; but it does not follow that he must show statutory provision for everything he does. No government could be administered on such principles. To attempt to regulate by law the minute movements of every part of the complicated machinery of government would evince a most unpardonable ignorance on the subject. Whilst the great outlines of its movements may be marked out, and limitations imposed on the exercise of its powers there are numberless things which must be done, that can neither be anticipated nor defined, and which are essential to the proper action of the government."

treaty in question was essentially the same as the one now before the court.[64]

In a Ninth Circuit Court case involving the Flathead Indian Reservation in Montana, this court refused to grant an injunction wherein it was alleged that excessive waters were being diverted by the defendants therein over the amounts allocated to them and their predecessors by the Secretary of Interior in 1921. The Treaty in question was similar to the one involved in the case at bar. The Government contended that all irrigable lands on the Flathead Indian Reservation whether allotted or surplus, had equal water rights and that all diversions whether from government or private ditches, were to be administered by the Project Engineer. This court held that because no showing could be made of a violation of a rule or regulation promulgated by the Secretary of Interior, the injunction would not lie.[65]

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64 United States vs. Powers, 305 U. S. 527; 83 Law Ed. 330, wherein it was stated: "The Secretary of the Interior had authority (Act 1887) to prescribe rules and regulations deemed necessary to secure just and equal distribution of waters. It does not appear that he ever undertook so to do."

65 United States vs. Alexander, 131 Fed. (2d) 359; C.C.A. 9-1942, wherein it is stated: "Assuming, without expressing an opinion thereon, that the water rights of appellees and those of the unallotted lands were of equal priority, as stated in United States vs. McIntire, 9 Cir., supra, the general allotment act (25 U.S.C.A. Sec. 381) requiring 'just and equal distribution' would be applicable here because of the insufficency of the water supply. That statute provides for promulgation of such rules and regulations as the Secretary of the Interior might deem necessary to secure the just and equal distribution of water. No such rules and regulations have been promulgated herein pursuant to that statue. The so-called 'secretarial de-

Clearly, under the applicable statutes and the cases thereunder, Secretary Garfield had ample authority to enter into the limiting agreement of 1908 and the same is valid. Actually the agreement was more favorable to the reservation than a straight adherence to the irrigated acreage on both sides of the creek would admit. If the acreage basis had been strictly followed, a division of about 80/20 would have been called for instead of 75/25 as finally negotiated.[66]

(b) ADMINISTRATIVE INTERPRETATION AND EVENTS SUBSEQUENT TO THE AGREEMENT OF MAY 9, 1908.

Notwithstanding the fact that the Indian Service under the 1908 Agreement had water for at most only about 1500 to 2000 acres[67] and had no definite plan at that time as to how they were to get more water, the Indian Irrigation Service nevertheless commenced construction of the Ahtanum Indian Irrigation Project on August 6, 1908.[68] As can be seen, the ink was hardly dry on this solemn water compact entered into by the parties on both sides in the utmost of good faith to settle for all time this difficult water rights matter, when the

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crees' related to alleged 'private' rights and were not of the character required. There not being a rule or regulation, of course a violation thereof could not be shown."

[66] Plaintiff's Exhibit 11-6, Appendix P. 14; R. 430-431.

[67] Plaintiff's Exhibit 13-A, Letter of May 6, 1929 from John H. Lynch to Dr. Ray Lyman Wilbur, Secretary of the Interior, Appendix P. 45, R. 557.

[68] Appellant's Brief, page 5.

Indian Service set about creating conditions that bred dissatisfaction in white patentees, white tenant farmers and the few Indians actually engaged in farming on the Reservation side of Ahtanum Creek and ultimately led to this litigation.[69]

The present Ahtanum Indian Irrigation Project completed in 1915 brought a total of better than 4900 acres of Reservation land under their newly constructed canal system,[70] when, as stated above, they had assured water for only 1500 to 2000 acres of land during the entire irrigation season. A more irresponsible course of conduct by the Government officials involved can scarcely be imagined. This course of action by the Indian Irrigation Service was most misleading and was a breach of faith upon its part towards the members of the Yakima Tribe of Indians involved, who, witnessing the construction of the system, undoubtedly thought that water would be forthcoming. Further, this enlargement of the Ahtanum Indian Irrigation Project was the primary cause of the pressure that later developed to repudiate the 1908 agreement.

In 1905 Secretary of Interior Hitchcock limited the rights of the Yakima Tribe of Indians in the low water flow of the Yakima River to 147 cubic feet per second.

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[69] Plaintiff's Exhibt 11-47, Letter of July 19. 1927 from R. K. Tiffany. State of Washington Supervisor of Hydraulics to Hubert Work. Secretary of the Interior; Appendix P. 40.

[70] R. 124 and 128.

This was a part of the general settlement of the water rights in the Yakima Valley along with the 1908 limiting agreement concerning Ahtanum Creek.[71] On January 23, 1913, the then Secretary of Interior, Wallace L. Fisher, issued a statement of principles to the Director of the Reclamation Service and the Commissioner of Indian Affairs holding the limiting agreement by Secretary Hitchcock above referred to valid and binding.

The rationale of Secretary Fisher is indeed interesting, as he holds that any other course of conduct would mean that the water rights to the Yakima River must forever remain undeterminable as to quantity until the Indian Irrigation Service eventually got around to determining at some indefinite future date what their needs were. That further this would prevent all irrigation development outside of the Indian Reservation.[72]

Subsequent to the limitation on the rights of the Yakima Indians in the low water flow of the Yakima River, a joint investigating committee of the Senate and House in 1913 came out to the Yakima Valley and held hearings. It then appeared that there was a valid need for more water from the Yakima River to serve Indian Reservation lands and this resulted in the Congressional

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[71] Plaintiff's Exhibit No. 11-36; Appendix P. 35.
[72] Plaintiff's Exhibit No. 11-36; Appendix P. 35.

Act of July 1, 1914 appropriating $600,000.00 for additional water from the Bureau of Reclamation.[73]

It will be noted that in the satisfaction of the additional Indian needs, the Department of Interior did not attempt to avoid Secretary Hitchcock's limitation and take the water away from the Sunnyside Valley Irrigation District, Selah Valley Canal System and other irrigation districts involved, but secured the additional water by purchase from storage sources. Appellees further urge that this Congressional Action was in full satisfaction and settlement of all claims to water by the Yakima Tribe of Indians in the Yakima River and its tributaries, which necessarily includes Ahtanum Creek. Thus, in effect, the litigation now before the Court is barred by reason of this settlement also.[74]

For a considerable number of years after the execution of the 1908 Agreement we find administrative interpretation in both the Offices of the Secretary of Interior and the Commissioner of Indian Affairs upholding the validity of the Agreement.

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[73] 38 Stat. 604, wherein it is stated: " * * * To furnish at the northern boundary of said Yakima Indian Reservation in perpetuity, enough water in addition to the 147 Cu. ft. per second heretofore allotted to said Indians so that there shall be during the low water irrigation season at least 720 cu. ft. per second of water available when needed for irrigation, this quantity being considered as equivalent to and in satisfaction of the rights of the Indians in the low water flow of the Yakima River and adequate for the irrigation of 40 acres of each Indian allotment."

[74] 38 Stat. 604.

On January 15, 1919 we find E. B. Merritt, Assistant Commissioner of Indian Affairs, writing Marvin Chase, State Hydraulic Engineer, that the agreement would be complied with by the Governement.[75] On June 7, 1929, E. C. Finney, Solicitor in the Department of Interior, advised the Secretary:

> "According to a familiar rule, vested rights thus created cannot thereafter be disturbed at least by administrative officers of the Government. Hence, under the circumstances here at hand, I am of the opinion that you would not now be justified in ignoring or attempting to repudiate the agreement entered into in 1908 involving the division of waters of this stream."[76]

This opinion was further approved on the same day by the First Assistant Secretary. Thereafter on June 18, 1929, Joseph M. Dixon, Acting Secretary of the Interior, advised John H. Lynch, Secretary of the Appellee Irrigation District, that the Department was abiding by the Agreement of 1908.[77]

On August 2, 1930, L. M. Holt, Supervising Engineer of the Indian Irrigation Service at Yakima, advised the Commissioner of Indian Affairs that he was abiding by the agreement of 1908.[78] On March 18, 1931, E. C. Finney, Solicitor of the Department of Interior, again in an opinion to the Secretary of the Interior, upheld the validity of the agreement, stating:

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[75] Plaintiff's Exhibit 13-J "A"; R. 119; Appendix P. 38-40.
[76] Page 10, Plaintiff's Exhibit 9; Appendix P. 47-50.
[77] Plaintiff's Exhibit 11-63; Appendix P. 50.
[78] Plaintiff's Exhibit 11-70; Appendix P. 54.

"The rights of the Indians and of the whites have been established and grown for over 20 years on the basis of the Agreement of May 9, 1908, and it is my opinion that the rights should not be disturbed by an abrogation of the agreement on the theory that the Secretary of the Interior did not have authority to make the agreement for the Indians."[79]

On April 11, 1931, C. J. Rhodes, Commissioner of Indian Affairs, by telegraph advised L. M. Holt, Supervising Engineer of the Indian Irrigation Service at Yakima, that the Agreement should be upheld under Solicitor Finney's previously mentioned opinion of March 18, 1931.[80]

On March 23, 1932, the Secretary of Interior, Ray Lyman Wilbur in a letter to Lynn J. Frazier, Chairman of the Committee on Indian Affairs in the United States Senate with reference to the hearings then progressing concerning Senate Bill 3998 stated that:

"During the 24 years that have elapsed, undoubtedly equitable and valid property rights founded upon the 1908 agreement have been established in third parties, and according to a familiar rule of law, vested rights thus created cannot be disturbed by administrative officers of the Government. Unless I am prevented by court action, I propose to adhere to the agreement of 1908. I, therefore, have no objection to the enactment of this legislation which I believe will be one step in the final settlement of a dispute running over many years."[81]

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79 Page 6, Plaintiff's Exhibit 9; Appendix P. 56.
80 Plaintiff's Exhibit No. 11-79; Appendix P. 65.
81 Plaintiff's Exhibit No. 11-102; Appendix P. 68-72.

Secretary Wilbur's letter was dated the day after a memorandum received by him from the Commissioner of Indian Affairs claiming the 1908 agreement invalid for unique reasons.[82]

On January 8, 1952, the Yakima Tribe of Indians filed with the Indian Claims Commission a claim for $1,173,300.00 and in the claim it is affirmatively stated that the 1908 agreement has been "continuously to the present recognized and allowed to be enforced" by the Government.[83]

It can be readily seen that for at least 24 years after the agreement of 1908 was consummated we have had departmental interpretation upholding the validity of the agreement. It has long been established by the United States Supreme Court that construction and interpretation of the Statutes by the Deparment charged with the enforcement thereof should be respected and upheld.[84]

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[82] Plaintiff's Exhibit No. 11-101; Appendix P. 65-68.

[83] R. 149, at page 154.

[84] United States v. Johnson, 124 U. S. 236; 253; 8 S. Ct. 446; 31 Law Ed. 389, wherein it is stated: "In view of the foregoing facts, the case comes fairly within the rule often announced by this court, that the contemporaneous construction of the statute by those charged with its execution, especially when it has long prevailed, is entitled to great weight, and should not be disregarded or overturned except for cogent reasons, and unless it be clear that such construction is erroneous."

In *United States vs. Finnell*, 185 U. S. 236, 244; 22 S. Ct. 633; 46 L. Ed. 890, it is stated:

> "But if there simply be doubt as to the soundness of that construction,—and that is the utmost that can be asserted by the Government,—the action during many years of the Department charged with the execution of the Statute should be respected, and not overruled except for cogent reasons."

The interpretation and construction of the Statutes by the Department of Interior such as the case now before the court is entitled to great weight and the Court should be very hesitant to rule invalid a solemn agreement negotiated under these statutes and honored by the contracting parties for such a long period of time.

It is interesting to note that in a District Court case involving the Yakima River where an irrigation district after executing a limiting agreement attempted to evade the terms of the agreement upon the claim that its officers had no power to sign the same, the Irrigation district was given short shrift by the court because they withheld action for a period of two years and the Government had expended money in reliance on the water rights settlement.[85]

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[85] United States vs. West Side Irrigating Company. 230 Fed. 284; wherein Judge Rudkin stated: "The corporation, its officers, and stockholders maintained a discreet, if not an intentional silence concerning this action for almost two years, and permitted the government to proceed with its work and with its vast outlay of money in the belief that all water disputes had been settled and adjusted in accordance with its requirements. That the defendant and its stockholders, under these circumstances, should now be estopped to question the authority of the officers or the validity of the contract, does not, in my opinion, admit of question."

In the case at Bar the Government is attempting to avoid the terms of its own solemn compact by a suit commenced almost 40 years after the execution of the agreement.

(c) STATE ADJUDICATION

On January 15, 1919, the Assistant Commissioner of Indian Affairs wrote Mr. Marvin Chase, State Hydraulic Engineer in Olympia, Washington, that the Government had advised L. M. Holt, Supervising Engineer for the Indian Service, to abide by the 1908 agreement. In the same letter it was further stated that the Commissioner of Indian Affairs Office felt that the State of Washington should take such necessary steps to require the white water users to carry out the terms of the agreement.[86]

On March 27, 1923, the Assistant Secretary of the Interior advised Mr. Chase that the Department would be pleased to cooperate with the State of Washington in the proposed adjudication of Ahtanum Creek as long as the water rights of the Indians were not infringed.[87] It is thus apparent that the Department of Interior and the Office of Indian Affairs were encouraging the State of Washington to proceed with the proposed settlement of water rights among the non-reservation owners contiguous to Ahtanum Creek. The Department knew with reference to the enforcement of the 1908 Agreement that it was

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[86] Plaintiff's Exhibit 13-J "A"; Appendix P. 38-40; R. 119.
[87] Plaintiff's Exhibit 13-A; Appendix P. 39.

necessary for the State to determine the priority of use among the non-reservation owners before there could be an enforcement of the 1908 agreement as contemplated by the Department on the part of non-reservation users. When in the letter of March 27, 1923, the Assistant Secretary of Interior spoke of no infringement of the water rights of the Indians, obviously he was not speaking of some vague, indefinite water right to be determined some time in the distant future but he was definitely speaking of the 25% of the waters of Ahtanum Creek allocated to the Reservation under the 1908 limiting agreement.

It is admitted under the pre-trial order that "The United States Government had knowledge of said adjudication and had an opportunity to appear therein but decided against such appearance."[88]

It thus appears that the United States could very well have been a party to the adjudication, if they had so desired, but in view of the obvious fact that only 75% of the waters of Ahtanum Creek were going to be adjudicated, the Government felt that it was not necessary for them to be a party to this proceeding. This is borne out by the Statement of the Supreme Court of Washington in its review of the appeal on the adjudication.[89]

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[88] Paragraph 7, Pre trial order, R. 128.

[89] In re Ahtanum Creek vs. Annie Wiley Achepohl and Johncox Ditch Company. et al, 139 Wash. 84, wherein the court stated: "Twenty-five per cent of the water of the streams is owned by the United States, and controlled and administered

This was a proceeding in Rem and all parties had a right to participate for the purpose of asserting their claims, if they so desired. It was open and notorious and bound the world.[90]

When the State of Washington was admitted to the Union upon an equal footing with the 13 original states, there was ceded to it jurisdiction to adjudicate the rights of all persons owning property, including water rights within the boundaries of the State.[91]

Further, the United States by its Constitution reserved to the State of Washington "The powers not delegated to the United States by the Constitution nor prohibited to the states respectively."[92]

We cannot see how the United States after encouraging the State of Washington to proceed with the adjudication and tacitly acquiescing to the findings of this adjudication, can now be permitted in a proceeding 25 years later to in effect have the State Court's proceeding declared a nullity and meaningless.

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by the Indian Bureau for the use and benefit of the Yakima Indian Lands under irrigation, leaving 75% of the water to be adjudicated herein."

[90] R.C.W. 90.04.020; U. S. vs. Ahtanum Irrigation Dist., 124 F. Supp. 818; page 836.

[91] Pollard vs. Hagan, 3 How. 212; 44 U. S. 212; 11 Law. Ed. 565.

[92] Amendment 10, Constitution of the United States.

(d) LACHES AND ESTOPPEL

The United States in this proceeding admittedly is representing the Yakima Indian Tribe rather than the public at large. It is not acting as a sovereign in a governmental capacity but rather acts in a proprietary capacity when bringing this action as a guardian for its Indian wards and performing duties for them.[93] Estoppel, laches and the principle of time limitation apply to the appellant in this action.[94]

The United States Supreme Court has held that the defense of laches may be maintained in a suit to set aside and establish equitable title to land wrongfully acquired from an Indian 27 years previously.[95]

In another case involving Indian rights the Eighth Circuit held that an Indian was barred by laches from maintaining suit for the recovery of a claimed allotment where the certificate of selection issued to him by the Agent was subject to the approval of the Secretary of Interior, which was not obtained, and the suit was not commenced until 35 years later, and 27 years after the

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93 Board of Commissioners vs. United States, 139 Fed. (2nd) 248; C.C.A. 10-1943.

94 U. S. vs. Beebe, 127 U. S. 338.

95 Felix vs. Patrick, 145 U. S. 317; 36 Law Ed. 719. wherein it was stated: "By conceding that the plaintiffs were incapable so long as they maintained their tribal relations of being affected with laches, and that these relations were not dissolved until 1887 when they were first apprised of their right to this land, it does not necessarily follow that they are entitled to the relief demanded by this bill."

land had been allotted to another Indian to whom the patent had issued.[96]

Again in the case of *United States vs. Winona and St. Peter Railroad Co.*, the Government erroneously or irregularly patented lands to or for the benefit of the defendant. It was argued that the grants were void in that the Land Department could not convey away public lands in disregard of the will of Congress. The court therein held that the equitable considerations favored the defendants.[97]

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[96] Lemieux vs. U. S., 15 Fed. (2nd) 518, C.C.A. 8th, in which the court stated at page 522: "In Badger vs. Badger, 2 Wall. 87, 17 L. Ed. 836, it was said that a party who makes an appeal to the conscience of the chancellor should 'set forth in his bill specifically what were the impediments to an earlier prosecution of his claim, how he came to be so long ignorant of his rights, and the means used by the respondent to fraudulently keep him in ignorance, and how and when he first came to a knowledge of the matters alleged in his bill; otherwise the chancellor may justly refuse to consider his case, on his own showing without inquiring whether there is a demurrer or formal plea of the statute of limitations contained in the answer.' Richards vs. Mackall, 124 U. S. 183, 8 S. Ct. 437, 31 L. Ed. 396; Felix vs. Patrick, 145 U. S. 317, 12 S. Ct. 862, 36 L. Ed. 719: Schrimpscher vs. Stockton, 183 U. S. 290, 22 S. Ct. 107, 46 L Ed 203; Bluejacket vs Ewert (C.C.A.) 265 F. 823.

"In the opinion in the case of Moran vs. Horsky. 178 U. S. 205, 20 S. Ct. 856; 44 L. Ed. 1028. appears this pertinent language; 'One who having an inchoate right to property, abandons it for fourteen years, permits others to acquire apparent title, and deal with it as theirs, and as though he had no right, does not appeal to the favorable consideration of a court of equity' . . ."

[97] 165 U. S. 463; 41 L. Ed. 789, the court stating: " * * * No fraud or wrong is imputable to the company (defendant). No effort to secure a misconstruction by the land department, but only an acceptance of the then settled rule of construction and the taking of lands which, under such construction, it was entitled to receive. Conceding that the construction was erroneous, yet it was one made by the officers of the department charged with the duty of administering the grant and determin-

Further with reference to the doctrine of Laches and Estoppel we wish to point out that the 1908 agreement following its execution was filed for record in the office of the Auditor of Yakima County, Washington, in Volume 72 of Deeds, page 35[98] and thus became a part of the title and particularly the water rights title of all lands securing water out of the Ahtanum Creek.

Obviously many bona fide purchasers without any knowledge whatsoever of recent claims made on behalf of the Indians for more water, have purchased lands along the north side of Ahtanum Creek, and the Government's efforts herein to make worthless their lands so purchased is unconscionable.

It is asserted by the appellant[99] that the appellees herein have prevented this controversy from being litigated. The Government obviously overlooks the fact that it was the one who withheld the filing of its bill in equity

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ing what lands did and what did not pass, the only tribunal to which the company could then apply, and upon whose rulings it was bound to act. Many years have passed since the certification, and since the company in reliance upon the title it believed it had acquired has disposed of the lands, and other parties have become interested in and have dealt with the lands as private property. Contracts have been entered into, suits maintained—carried even to this court—and decrees and judgments entered and rendered in full reliance upon the title supposed to have been conveyed. Surely after such a lapse of time, and after so many transactions in respect to these lands, the appellees (defendants) are justified in saying that they have large claims upon the equitable consideration of the courts."

[98] Pre trial order, paragraph 8; R. 128.

[99] Appellant's brief, page 25.

in the first instance in 1907. If any litigation was to be filed concerning the waters of Ahtanum Creek, that was the time to do so.[100] Many times, as evidenced herein[101] the Government upheld the 1908 Agreement by administrative interpretation. While it is true the Ahtanum Irrigation District did not wish the expense and uncertainty that is a part of every lawsuit, it was, nevertheless, the Government's own act, as stated by the trial court[102] that delayed the commencement of this case until long after innocent people had secured vested rights.

It is further submitted that the Indian wards, for whom the appellant claims to be acting in this case, have in effect abandoned their alleged claim to the waters of Ahtanum Creek over and above an amount of 25% by filing their claim against the United States.[103] By filing this claim they have in effect confirmed the practical application of the 1908 Agreement over the years and have admitted its binding effect. Parenthetically at this point it might be well to mention that if it is felt that the Yakima Indian Tribe has been unjustly dealt with, the blame falls squarely upon the United States and the proper remedy lies either in bringing more water to the Ahtanum Valley by means of the Klickitat Project, which is feasible,[104] or by a payment of money damages in ac-

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100 This brief, supra, page 8.
101 Appendix B, page 7, et seq.
102 R. 425-426.
103 R. 149.
104 R. 129.

cordance with the claim above referred to. This suggestion was first made by Chief Engineer Code at the time of his original investigation and report.[105]

The appellant's standing in equity clearly does not entitle it to any relief. Equitable maxims are applicable to the State as well as to individuals.[106] Historically, courts of equity have applied the maxim that "he who comes into equity must come with clean hands"[107] and the appellant in seeking to overthrow its own solemn agreement of 1908 relied upon for years by its citizens, does not come into equity with clean hands. It has also been often stated that "Equity aids one who has been vigilant and will refuse relief to one who has been dilatory or wanting in diligence in prosecuting his cause of action."[108]

Certainly it cannot be said that the appellant has been diligent or vigilant in prosecuting this action. The maxim that "he who seeks equity must do equity" has application herein. Can it be said that the appellant in seeking to set aside the agreement of 1908 has in any way offered to make the appellees whole? On the contrary, they are seeking to take away from the appellee the fruits of 80 years of work and saying that the ap-

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105 Plaintiff's Exhibit No. 11-6; Appendix 13.

106 19 Am. Jur. Sec. 449, page 311; People's National Bank vs. Marye, 191 U. S. 272; 48 Law Ed. 180.

107 Tompkins vs. Wheeler, 16 Pet. 106; 10 Law Ed. 903.

108 Baker vs. Cummings, 169 U. S. 189; 42 Law Ed. 711.

pellees should not have relied upon the acts of the appellant's responsible heads of the Department of Interior.

More than 80 years have now passed since the lands along the north bank of Ahtanum Creek were settled and water diverted for the irrigation of those lands. As the lower court so aptly stated: These pioneer settlers engaged "in building an empire out of the wilderness."[109] Schools and churches have been built, several small towns, namely Wiley City, Ahtanum and Tampico, have grown up in the Ahtanum Valley. The present water users and their ancestors before them have invested their life's work and savings in these homes, ranches and farms, relying upon their right to receive the life-giving waters of Ahtanum Creek. The appellant did not contest that right in the State court or elsewhere, although it had full knowledge of all facts and the law applicable thereto, until the commencement of the present suit in 1947. As discussed supra, where the situation was reversed and an irrigation district was attempting to avoid a limiting agreement upon which the Government had relied[110] it was held that the passage of a mere two years would estop the irrigation district from questioning the validity of the limiting agreement. Surely in good conscience the lapse of 39 years between the 1908 Agreement and the com-

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[109] United States vs. Ahtanum Irrigation District, 124 F. Supp. 818, at page 841.

[110] United States vs. West Side Irrigating Company, 230 Fed. 284.

mencement of this suit estops and bars the Government from now questioning the validity of this agreement affecting 10,000 acres of land in the Ahtanum Valley and the lives and fortunes of 900 families.

ANSWER TO ARGUMENT OF APPELLANT

(a) DISMISSAL OF PLAINTIFF'S COMPLAINT PROPER UNDER THE LAW AND THE EVIDENCE.

Appellant has detailed evidence on which it claims judgment.[111] That evidence fails to recognize a number of important elements. A large percentage of allotted lands has been sold or leased to operators other than Indians.[112] The appellant is not representing anyone in this case except its Indian wards.[113] The irrigation from Ahtanum Creek in 1847 was practiced not by the Indians but by the Catholic Mission and all on the north side of the Creek.[114] The evidence fails to show the use of any specific quantity of water on any particular tract of Reservation land. The wards of the appellant never claimed possession or control of waters in excess of 25% of the flow, to which the appellees admit they are entitled.[115] No evidence was adduced to show that any portion of the 75% of the waters of Ahtanum Creek was ever used on any particular lands in the Reservation. On the contrary

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111 App. Br. 21-24.
112 R. 129, 474.
113 R. 374.
114 Plaintiff's Exhibit 12.
115 R. 149 to 156.

the appellees show a judicial finding of appropriation and beneficial use of 75% of the flow on the north side which has been adjudged to be appurtenant to certain tracts, entitling such tracts to specific quantities of water.[116] The burden is on the appellant to establish a valid claim to more than 25% of the flow of Ahtanum Creek. This they have failed to do and a dismissal is therefor a proper disposition of the appellant's claim.

The appellant in bringing this action is bound by the usual rules of evidence and proof. Blame for the protracted and contentious controversy rests squarely on the appellant " * * * repeated efforts of the United States of America to initiate these proceedings * * *[117]" does not present a proper statement or one made in good faith. There may be some explanation for the Attorney General's failure to file the bill in equity in August of 1907.[118] Then was the time to litigate this problem instead of after a delay of 40 years and after equities have arisen and laches and estoppel apply.[119]

The appellant is not bringing this action " * * * to defend rights to the use of water reserved * * * ."[120] It seeks to recover the right to the use of water that passed beyond its control 40 years before this case was

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[116] Defendant's Exhibit 139, In re Ahtanum Creek, 139 Wash. 84; 245 Pac. 758.
[117] App. Br. 25.
[118] Plaintiff's Exhibit 11-14; 11-17; Appendix 12-13.
[119] See supra, page 31.
[120] Appellant's Br. 27.

filed. The claim of implied reservations will be discussed later in this brief.[121]

(b) CLAIMED INVALIDITY OF AGREEMENT OF MAY 9, 1908

Appellant claims in its complaint and its contentions in the pre-trial order that the agreement of 1908 is invalid. The citation to the pre-trial order is not to an agreed fact but to appellant's contention where there is no mention of so-called "subordinate officials."[122] The appellant's oft repeated slur on the Secretary of the Interior, the Commissioner of Indian Affairs and the Chief Engineer comes with poor grace from counsel whose predecessor in office had a signed bill in equity resting in his office when the agreement of 1908 was made.[123]

The United States District Attorney represented the Attorney General and participated in the settlement made to "avoid litigation."[124]

The statement that no official could " * * * relinquish * * * 75% of the natural flow of Ahtanum Creek * * * "[125] pre-supposes that the appellant was entitled to the use of all of the flow of the creek. In not one case cited by the appellant is it held that the Winters case doctrine au-

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121 See infra, page 50.
122 R. 131.
123 Plaintiff's Exhibit 11-6, 11-18, 11-19, 11-21, 11-27; Appendix A & B.
124 R. 547 to 552.
125 Appellant's Brief 31.

thorizes the taking of the entire flow of a border stream by the Indians on a Reservation.

The apportionment by the Agreement of 1908 was the result of negotiation.[126] Acreage was a factor. Appellant argues the agreement is improper because no one knew the extent of future development.[127] The fallacy of this argument is patent in that its application would permit the removal of all the water from border streams to the complete destruction of property and rights of other users of the water in the stream. Such a rule was never intended by the Winters case doctrine and is not so held.[128] Administrative and congressional interpretation so show.[129] The Winters case was decided by the Supreme Court of the United States in January of 1908. Under the rule of contracts, often applied, the Winters case must be read into and become a part of that contract. For the settled law of the land at the time a contract is made becomes a part of it and must be read into it.

Likewise, it is presumed that the parties bargained with each other on the basis of existing law, which would include the Winters decision.[130]

Appellants make no showing of the lack of authority

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126 R. 547, 548.
127 App. Br. 32.
128 See infra, page 41.
129 Plaintiff's Exhibit 11-36; 38 Stat. 604.
130 Great Northern Railway Company vs. Sunburst Oil and Refining Co., 287 U. S., 358, page 362; 77 Law Ed. 360, at page 365.

on the part of the Secretary of Interior to enter into the agreement of 1908, and do not show any failure on his part to obtain the approval and authority of the Attorney General.

In the absence of any proof to the contrary, there is a strong presumption that public officers have properly discharged the duties of their office and that all acts performed are within the sphere of their official duty.[131] The presumption also applies to cabinet officers and their assistants.[132]

(c) THE WINTERS CASE DOCTRINE

The appellant seeks by its brief to enlarge on the Winters case doctrine.[133] Briefly stated, that doctrine is that the Indians gave up certain rights when they entered into the Treaty under which the Reservation was created, and the rights not specifically granted were impliedly reserved. The reserved rights included the right to the use of a portion of the waters in a border stream for irrigation of lands on the Reservation.

The Winters case had for consideration a later Treaty than the one here involved and three successive treaties had resulted in the contraction of the Indian Reservation

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131 U. S. vs. Chemical Foundation, 272 U. S. 1, at page 15; 71 Law Ed., 131 at page 143. Quinlan vs. Green County, 205 U. S. 410; 51 Law Ed. 860; Vitelli vs. U. S., 250 U. S. 355; 63 Law Ed. 1028.

132 U. S. vs. Carr, 132 U. S. 644, at page 653; 33 Law Ed. 483, at page 486.

133 App. Br. 33 to 37.

until one boundary was fixed as the center of Milk River. In that case the issue was not the reservation of all of the waters of Milk River, such as the appellant claims here. The non-reservation owners on Milk River conceded that if the Indians were entitled to any waters, their request was a reasonable one.[134]

There is a misconception reflected in the appellant's argument as to the rule in the Winters case. The early case[135] holds that the right to 5000 inches of water was sufficient to satisfy the reasonable needs of the Indians and injunction issued accordingly.

The decision of the Winters case contained certain language which in the absence of a clear understanding of the issues before the court is susceptible to misinterpretation. In at least two instances the United States Supreme Court refers in general terms to a reservation of "the water." The Court did not say that all of the waters of Milk River were reserved and what the Court meant by its use in several instances of the term "the water" must be gathered from the context. The position of the appellants, who were the defendants in the lower court, was that the Treaty of 1888 did not effect a reservation of any portion of the water of Milk River. The defendants did not ,however, deny the need of the Indians for 100 cfs. of water. Their contention, however, was that

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134 207 U. S., 564.

135 Winters vs. U. S., C.C.A. 9 (1906) 143 Fed. 470.

no water was reserved for the Indians, but if there was a reservation of any portion of the water, the amount claimed was a fair amount to satisfy the reasonable needs of the Indians. The result was that the Supreme Court under the pleadings as presented had only two possible alternatives: To hold that there had been a reservation of 100 cfs. or that there had been no water reserved under the Treaty. It therefore becomes clear that when the Court refers to a reservation of "water," it means the water at issue in the case; that is 100 cfs. of the water of Milk River, not to the total flow of the stream as is claimed by the appellant in this case.

The only case that passes directly upon the question of the rights to water in a boundary stream as between the Indian allottees and the patentees from the United States of America, is the case of *United States v. Walker River Irrigation District.*[136] This court specifically holds in the Walker River case that a limitation upon the quantity of waters which could be claimed is that which will satisfy the reasonable needs of the Indians. In the Walker River case the United States endeavored to enlarge the definition of "reasonable needs" by setting up a criterion by which it could be measured. It was argued that the amount of water reserved depended not upon the actual needs of the Indians but upon the quantity of water needed to supply all of the irrigable lands upon a particular res-

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136 (C.C.A. 9) (1939), 104 F. 2d. 334.

ervation. This court in that case rejected that theory and held that the acreage of land which happened in the particular case to be irrigable from the streams flowing through the reservation was a purely fortuitious circumstance, not necessarily having any bearing upon the actual needs of the Indians.

The rule of "reasonable needs" as applied in the Walker River case does not appear to apply in the Ahtanum case. Any reservation of waters was not by express but by implied terms and should be given no broader scope than is necessary to carry out the purposes intended in the Treaty. There are ample waters arising on the reservation or supplied by bordering streams to more than satisfy the needs and requirements of all of the Indians. Certainly therefore the appellant in this case is not correctly stating its position and is not the real party in interest when it endeavors to apply the theory in the Walker River case and the theory in the Winters case to its claimed right of recovery. The reasonable needs of the Indians have been more than satisfied.[137]

A District Court case decided in 1916[138] recognizes the limitation on the Winters case. Therein the court says:

> "The same officers of the government charged with the protection of the Indians also executed its land

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[137] See R. 474 to 476 in which appellants' witness could name only 11 Indian farmers.

[138] United States v. Wightman (D. C. Ariz. 1916) 230 F. 277.

> laws, for both are under the charge of the Secretary of the Interior, and his action in approving the sale of the land with water rights is of equal dignity and binding force on the government as the demand now made by his subordinate with his approval for the use of the waters by the Indians. * * *" (P. 284)

Thus it is recognized eight years after the Winters case was decided that it is not of universal application and does not apply to the reservation of all of the waters of a stream.

The Conrad case recognizes the rule in the Winters case[139] and holds that there is an implied reservation of waters to irrigate certain lands on the reservation but the Walker River case appears to be the last pronouncement on the subject which limits the rights of water to the reasonable needs of the Indians then existing.

Between the Wightman case and the case of Walker River Irrigation District,[140] the Courts have been confronted with several cases involving Indian water rights. None of them involve the rights of reservation against non reservation lands. Two of these cases involve questions relative to the interpretation of express Treaty provisions reserving water rights to the Indian allottees.[141] These cases do support the rule that Indian Treaties must be construed favorably to the Indians, but they appear to

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139 Conrad Investment Co. v. U. S. (C.C.A. 9, 1908) 161 F. 829.

140 104 F. 2d. 334.

141 Skeem v. United States (C.C.A. 9, 1921) 273 F. 93, and United States v. Hibner, (D. C. Ida. 1928) 27 F. 2d. 909.

be little or no authority for the rule defining rights of reservation against non-reservation land as in this case where the rights exist, if at all, by virtue of an implied reservation.

Another case involving Indian water rights is that of *United States v. Powers.*[142] This case involved a controversy between the United States, representing the rights of an Indian Irrigation project within the reservation, as against white successors to Indian allottees, who had constructed their own irrigation system on other portions of the reservation. The court held that the whites had succeeded to the rights of their Indian predecessors and that those rights were on a parity with the rights of the Indians on the reservation. The decision in effect holds that all of the parties whose rights are before the court were tenants in common in whatever water right the reservation possessed.

The last three cases cited appear to have no bearing on the question as to what quantity of water can be claimed by an Indian reservation. In the decision in the Walker case this Court apparently found it unnecessary to distinguish the Powers case even though the Powers case and the Walker case came before this court within about one year of each other.

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142 (1939), 305 U. S. 527, 83 L. Ed. 330. Affirming United States v. Powers, C.C.A. 9, 1938, 94 F. 2d. 783.

In the McIntyre case[143] there is involved an inter reservation dispute. McIntyre's predecessor had been granted an appropriative right by the State of Montana to a portion of the waters of Mudd Creek for use on reservation land. McIntyre commenced suit to establish the superiority of this appropriative right over that of an Indian Irrigation Project on the same reservation. The suit was dismissed upon the ground that Montana law relative to the appropriation of water had no application to reservation lands. This holding is similar to the holding in our Supreme Court.[144]

The Walker River case[145] is the one which makes a square issue as to the quantity of water which may be claimed by the Indians collectively as against the whites on non reservation lands. The Walker River Indian Reservation was established by executive order in 1859. Use of the water by the whites above the reservation considerably depleted the supply available for the reservation. There were approximately 10,000 acres of land on the reservation susceptible to irrigation. However, only about 2100 acres were actually under irrigation. It was the position of the United States that there was reserved by the executive order of 1859 creating the reservation, sufficient water to irrigate all the irrigable lands or 150 cfs. of

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143 United States v. McIntyre (C.C.A. 9, 1939) 101 F. 2d. 650.

144 Gough v. Taylor, 110 Wash. 631, 188 Pac. 458.

145 United States v. Walker River Irrigation District (C.C. A. 9, 1939) 104 F. (2d) 334.

water. This claim is stated by the Court as follows: (p. 335)

> "The claim of the government, asserted on behalf of the Indians living on the reservation, is that, to the extent necessary to supply the irrigable lands, the waters of the stream were reserved. * * *
>
> "We hold that there was an implied reservation of water to the extent reasonably necessary to supply the needs of the Indians. There remains for decision the question as to the quantity of which the United Staes is entitled. The problem is one of great practical importance, and a priori theories ought not to stand in the way of a practical solution of it.
>
> "The decree is reversed wtih directions to enter a decree adjudging the United States to be entitled to the continuous flow of 26.25 cubic feet of water per second * * * for the irrigation of 2,100 acres of land on the reservation * * * ."

Thus it appears that the only case which seems to fix the maximum limit upon the quantity of water impliedly reserved for the Indians adopts the yard stick as the quantity of water "reasonably necessary to supply the needs of the Indians."

Applying this rule to the Ahtanum case gives to the appellees the protection first of the contract of 1908, second the Act of 1914,[146] third, the adjudication of the water rights by the State of Washington;[147] fourth, the administrative interpretation of the acts and conduct of the re-

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[146] 38 Stat. 604.
[147] Deft. Ex. 139.

spective parties, including the determination by the Yakima Indians to make claim against the Indian Claims Commission, recognizing and stating therein that they were limited on the date of the claim[148] to 25% of the flow of the stream.

We respectfully submit, therefore, that under the rule in the Winters case there has been and is in the contract of 1908 a satisfaction of the reasonable needs of the Indians in accordance with the Walker River case and in accordance with the Winters case, which case was decided by the Supreme Court before the contract was executed.

The reasonable needs of the Indians on the Yakima Reservation is at most all appellant can claim under the implied reservation. Here the allowance by Congress in 1914 gave the Yakima Reservation water for 70,000 acres of land.[149] This was enough water for 40 acres of irrigated land on every Indian allotment. This certainly should have satisfied the reasonable needs of the Indians. There were 2401 Indians on the Yakima Reservation in 1937.[150] This would mean 29 acres of Indian land for every Indian, man, woman and child, on the Reservation and would ex-

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148 R. 149.
149 38 Stat. 604.
150 Annual Report of the Secretary of Interior, 1937, page 261.

ceed by four to seven times the amount held to be reasonable in the Walker case.[151]

(d) FINDINGS ON TREATY OF 1885

The Treaty made reference to Ahtanum Creek and the South Fork as the north boundary of the Reservation.[152] In the Winters case the boundary of the Reservation is the center of Milk River.[153] This fact is of importance and commented upon by the Supreme Court in expressing the doctrine of implied reservation.[154]

If important in that case, the failure to mention it here is likewise important, especially since the patents to the Indian wards follow Government surveys which are to the meander line on the south bank of the stream.[155] Likewise, the patents of the lands on the north side are to the meander line.[156] The findings of the Court, therefore, that Ahtanum Creek is not included in the Yakima Indian Reservation has basis in both the patents and the express words of the Treaty.[157]

That some of the water of Ahtanum Creek arises

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151 U. S. vs. Walker, C.C.A. (1939), 104 Fed. (2nd) 334.
152 R. 16, Plaintiff's Exhibit 1.
153 207 U. S. 564.
154 "Why was the northern boundary of the Reservation located in the middle of Milk River unless it was for the purpose of reserving the right to the Indians to the use of said waters for irrigation as well as for other purposes." Winters vs. U. S., 207, U. S. 564.
155 Plaintiff's Exhibit 4-b, 4-d.
156 Defendant's Exhibit 142.
157 Appellant's brief 37.

outside of the Reservation is in line with the Winters case.[158] Applying the statement above quoted literally[159] the implied reservation would be to an amount of the flow in the south fork which is less than 25% of the total flow.[160] Hence the allowance by the agreement of 1908 enlarges the claim of implied reservation which might be made under the literal interpretation of the Winters case.

Appellant has misstated the findings when he quotes that there is no reservation by the Treaty of 1855 "either express or implied."[161] The findings state "that there was no reservation of any water rights to Ahtanum Creek by the Treaty of 1855 either express or implied * * * *adverse to the defendants* * * * ."[162] In the opinion the learned trial court states:

> "Here, in accordance with previous decisions, we decide that there was a reservation of the use of some water of Ahtanum."[163]

The reservation was of 25% of the flow under the agreement of 1908 or about 20% if the reservation is limited to the flow of the South Fork. There is no claim that the landowners on the north side encroached on the 25% of the flow for the "reasonable needs" of the Indians.[164]

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158 Supra, Appellant's brief 38.
159 See footnote No. 152.
160 Plantiff's Exhibit 4-e.
161 Appellant's brief 39.
162 R. 161, Findings of Fact No. 5, emphasis added.
163 U. S. vs. Ahtanum Irrigation District, 124 Fed. Supp. 818, 831.
164 Appellant's brief 39.

Counsel again purports to assert a right to all of the waters of Ahtanum without so stating. That the appellees have always asserted a claim to 75% we do not deny, but apepllees do deny that they have infringed on the reserved amount of 25%, which is all the appellant is entitled to claim. From the repeated assertions of the appellant that they claim all of the flow of Ahtanum, we conclude that they make no claim to any lesser amount. The question suggested is: "If there is any infringement, where is it and to what extent?" Appellant claims error but nowhere answers that question. The court's finding that there was little or no thought of irrigation in 1855 is emphasized by the Exhibit cited by appellant.[165] That Exhibit constrains statements contrary to appellant's claim. "The practice of artificial irrigation in the Territory (now State) of Washington had the beginning and progressive development on the Ahtanum Mission * * * , and while some claims have been made that the Indians of this area first practiced the art, the evidence offered is not convincing. The probabilities are all to the contrary. Their habits of living were nomadic; they lived on the wild game, fish and wild roots and berries. They had and to a large extent still have a marked distaste and disinclination to till and crop the soil * * * ."[166]

The statement is made that our Nation would not

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165 Appellant's brief 40.

166 Plaintiff's Exhibit 12, page 2, of the Beginning of Irrigation in the State of Washington.

force the Indians onto arid land without waters.[167] The appellant has done worse. It has entered into an agreement with non-reservation owners,[168] encouraged them to adjudicate 75% of the flow of Ahtanum,[169] ignored an adequate supply of water from the Klickitat River, which arises and flows entirely on the Yakima Reservation,[170] and now seeks in this action to recover all of the water granted to the non-reservation owners. The reasonable needs of the Indians were satisfied by the agreement of 1908.

Patents have issued to the north side land owners without any express reservation of water rights.[171] Appropriation and beneficial use is recognized as the method of acquiring a water right.[172] The appellees have acquired such rights for the land north of Ahtanum Creek, which is a border stream and to which we do not feel the rule cited by appellant from the Federal Power Commission case applies.[173]

The State Law in Washington is as stated in the findings.[174] The common law right of a riparian owner is preserved. Likewise, the statutory right of appropria-

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167 Appellant's brief 41.
168 R. 26; Plaintiff's Exhibit 11-27 Appendix P. 1.
169 Defendant's Exhibit 139.
170 R. 450 and 129.
171 Defendant's Exhibit 141, 142, 142-A.
172 Appellant's brief 41.
173 Federal Power Commission vs. State of Oregon, 349 U. S. 435 (1955); Hough vs. Taylor, 110 Wash. 361; 188 Pac. 458.
174 R. 161, Finding of Fact No. 8; Appellant's brief 41.

tion is recognized by Washington.[175] A riparian owner, however, may lose his right to the use of water in a stream to a subsequent appropriator who applies the water to a beneficial use, if the riparian owner does not.[176]

The court found that the appellant confirmed the rights of appellees to lands and waters ouside the Yakima Reservation.[177] This is claimed as error without any supporting references except Appendix C of Appellant's brief.[178]

We refer in answer, to appendix B of this brief. to the failure of the Attorney General to file his bill in equity, to the construction placed on the agreement of 1908 before and after is execution, to the statement of the solicitor and three different Secretaries of Interior as well as to the Act of 1914,[179] and the Reclamation Act of July 17, 1902.[180]

Such statutory enactments and interpretations of the Treaty are similar to the interpretation made by the Supreme Court of the State of Oregon to the similar Treaty in *Byers vs. Wa-Wa-Ne,* 86 Ore. 617; 169 Pac. 121.

Appellant again attacks the agreement of May, 1908.[181]

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175 C. Horowitz Riparian and Appropriation Rights to the Use of Waters in Washington, 7 Wash. Law. Rev. 197.
176 Brown vs. Chase, 125 Wash. 542; 217 Pac. 23.
177 R. 162, Findings of Fact No. 13.
178 Appellant's Brief 43.
179 38 Stat. 604.
180 32 Stat. 388.
181 Appellant's Brief 43.

The "subordinate officials" are named above, to which should be added the United States District Attorney. There is apparently an intentional failure to recognize two basic principles of law which are (a) That there is a strong presumption of validity and legality following the acts of all public officials,[182] (b) That since the Winters opinion was filed in January 1908 and was the settled law of the land at the time the contract was entered into on May 9, 1908, it became a part of that contract and must be read into it just as if an express provision to that effect were inserted therein.[183]

(e) STATE ADJUDICATION WATER WASTE

The appellant objects to the finding of fact on the State adjudication of the right to the use of 75% of the water of Ahtanum Creek.[184] The claim is made that there is not a scintilla of evidence to support the conclusion that the adjudication was encouraged.

The appellant must admit that its agents stated that they were complying with the agreement for the division of water, being the agreement of 1908.[185] The Assistant Commissioner of the Office of Indian Affairs stated that he felt justified in asking the State of Washington to take steps with respect to the white water users to require

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182 See supra page 41.
183 See supra, page 40.
184 Appellant's Brief 45, 54.
185 R. 119, 120.

them to carry out their part of the agreement. The Commissioner's letter of September 17, 1923 to the Supervising Engineer of his Department would appear to be just as expressive and a like encouragment.[186]

Objection to the finding of fact on the possession and use of water on the Reservation would appear to criticize the learned Trial Court in a finding which, in our judgment, should be joined in by the appellant.[187] If the stream is outside of the Reservation appropriation and beneficial use might establish the right to the use of the water as appurtenant to certain tracts of land. Counsel has failed to establish that the water is appurtenant to any particular tract of land. Counsel will agree that he is claiming that the water if owned by the United States of America, and if the United States is entitled to maintain this action, is not appurtenant to any particular tract of land. Counsel, however, states that the water is an interest in real estate,[188] but at no place in his brief does counsel point out to which particular real property the water is appurtenant. He apparently seeks further in his brief to quiet the title to all of the flow, maintaining that it is not necessary to show that any person was in possession of any particular portion of the flow of the water in the stream.

The argument made by counsel is, we believe, fal-

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186 R. 120.
187 Appellant's Brief 45 to 48.
188 Appellant's Brief 45.

lacious in several particulars. The appellant is seeking to reclaim the possession and title from the appellees of the remaining 75% of the flow of the stream. This can only be done by proving a superior title. The appellant must recover on the strength of its own title, not on the weakness of the title of the appellees. The court has found and concluded that the appellant had no title or right to the additional 75%. The finding and conclusion that counsel has failed to establish possession and use of any portion of the 75% on any property in the reservation is an additional ground for holding that the appellant is unable to recover and that the dismissal is a proper judgment.

If counsel's other argument is correct that the stream is within the Reservation, and therefore the right to appropriate the waters under the Desert Land Act, does not apply, we conclude that the water cannot be appurtenant because the users of the water are tenants in common[189] in whatever water right the Reservation possesses.

This is not a quo warranto proceeding in which a person may be required to establish his right to an office or to property. It is necessary that the appellant recover, if at all, on the strength of its own title to the additional 75% of the water as claimed.

Appellant has never defined what right it claims.

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189 U. S. v. Powers (1939), 305 U. S. 527.
190 R. 470.

The appellant is asserting the right to the entire flow of the stream.[190] We have endeavored to point out that the Winters case does not in any particular lend support to the claim that a border stream is even by implied reservation to be used entirely on the reservation. There are obligations on the part of the United States of America to the landowners who have received patents, as well as to the Indians.

The appellant in asserting a claim must first establish its right by a fair preponderance of the evidence. As we read the record[191] the Court holds that the appellant has failed to establish any right to the 75% of the flow of Ahtanum Creek superior to the rights of the appellees.[192] The State adjudication was held to be binding upon the United States. That adjudication, encouraged by the appellant, divided the 75% of the flow among the landowners on the north side of Ahtanum Creek. For the appellant to sit idly by and watch the process of adjudication in operation is to create a condition which will estop the appellant. The adjudication did not infringe on any rights then claimed by the appellant for its Indian wards. Certainly if such a claim were being made it was then encumbent upon the appellant to make that claim. There could be no question about the estoppel if the appellant were a private party. We submit this phase of the case

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191 R. 164, 165.
192 Appellant's Brief 48 to 54.

on our previous argument as to the *validity* of adjudication.

The appellant asserts that there is evidence and proof of the waste of water by the non-reservation landowners.[193] As proof of that waste there is cited an isolated instance of what counsel characterizes as "wasted water from Ahtanum Creek, hub deep in the highway * * * ." The testimony does not seem to sustain counsel's statement as the record shows the testimony to be " * * * we went through a puddle about 6 or 8 inches deep."[194]

The rank growth of tules, water grass and cattails is described as being evidence of the waste of water. The testimony, however, does not so show. The tules and cattails were on the portion of the project at a point where there existed a high water table. The evidence would therefore show that there was an ample supply of water at that point and would not necessarily be evidence of any waste of water. In fact, the testimony indicates that the tules appear at a point where the waste water from another project entered the valley.[195]

Open canals, old river beds and other water courses were used in 1908 when the agreement was made. They were used in 1925 when the State adjudication took place.

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193 Appellant's Brief 58.
194 R. 472.
195 R. 454.

They are all on the north side of the stream and below the measuring point at the Narrows. The use of such methods, which we do not agree are wasteful, might be objected to by someone who was sharing in the 75% of Ahtanum Creek under the Decree of Adjudication. Appellant's criticism of the use made of the 75% of the flow does not warrant taking away the water from the appellees. Appellant cannot establish title to property by being critical of the way appellees use it.

The claim of waste is directly contradicted by the testimony of the witnesses for the appellees.[196] Likewise there is evidence of the use of wells to supplement the waters in the stream during the low water period.[197]

FEDERAL LAND BANK AND ITS INTERESTS

The appellee, the Federal Land Bank of Spokane hereby adopts and asserts the arguments advanced herein on behalf of the appellees, Ahtanum Irrigation District. The Land Bank has taken numerous mortgages on farms and ranches in the Ahtanum Valley[198] and a successful maintenance of the appellant's claim would obviously jeopardize the security of the appellee, Land Bank's mortgages. These mortgages were negotiated and granted in the utmost of good faith, relying upon the established water rights of the mortgagors, recorded in the first in-

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196 Ray West, R. 493; K. P. Bates, R. 497; J. R. Rutherford, R. 502, 503, and Mr. Shockley. R. 509.

197 R. 527-531.

198 Defendant's Exhibit No. 143.

stance under the 1908 Agreemnt and later particularized under the Achepohl Decree adjudicating Ahtanum Creek.[199] Again equitable principles require affirmance of the lower court's decision to protect the interests of this third party that acted in reliance on these established water rights.

CONCLUSION

It is respectfully urged for the above and foregoing reasons, the judgment and decree of the trial court should be affirmed and the validity of the 1908 Agreement upheld. That further this Honorable Court should issue its injunction as prayed for herein[200] implementing the decree of the trial court.

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CHARLES L. POWELL
J. W. McARDLE
Attorneys for Appellee,
Ahtanum Irrigation District

E. C. PRESTBYE
Attorney for Appellee,
Federal Land Bank of Spokane

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199 In re Ahtanum Creek, 139 W. 84, 245 P. 753.
200 Infra Page 62 this brief.

IN THE UNITED STATES
COURT OF APPEALS
FOR THE NINTH CIRCUIT
201

UNITED STATES OF AMERICA, *Appellant*	No. 14714
vs.	Motion for Injunction Pending Appeal
AHTANUM IRRIGATION DISTRICT, et al., *Appellees.*	

COMES NOW the AHTANUM IRRIGATION DISTRICT, one of the appellees in the above entitled proceeding, in behalf of all appellees, acting by and through its attorneys, Fred C. Palmer, Charles L. Powell, and J. W. McArdle, and respectfully moves this Honorable Court for an injunction pending the appeal of this case and until the revesting of the District Court with jurisdiction by the return of the mandate to that Court, said injunction to be for the purpose of maintaining the status quo of the parties and to remove the danger and threatened danger of irreparable injury to the appellees. This motion is made pursuant to Federal Rules of Civil Procedure, Rule 62 (g).

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201 The appellees filed a motion for injunction pending appeal. It was before the Court in Seattle, Washington, on January 9, 1956, but taken from the calendar to be renewed and heard with the main argument in this case. Motion and argument are reprinted herein. The affidavits, including report of the Water Master for Yakima County for 1955 appear in Appendix "C," Page 73 et. seq.

1. The Ahtanum Irrigation District is organized under State law and all property and rights are held and exercised by it as a public trust for the use and benefit of the landowners in the district.

2. That this cause is presently on appeal and this motion for injunction pending appeal is made based upon said record, and the whole thereof, and particularly the Findings of Fact and Conclusions of Law[202] and the Judgment of Dismissal[203] which are by reference incorporated in this motion and made a part hereof.

3. That the Trial Court, the Honorable James Alger Fee, United States Circuit Judge, found and determined that a certain contract of 1908 was a valid agreement[204] and that an adjudication was made in 1926 adjudicating all claims to 75% of the flow of Ahtanum Creek[205] and that the United States of America, appellant in this cause, has only the right to divert from Ahtanum Creek 25% of the flow thereof.

4. During the irrigation season of 1955 diversions were made by the appellant in excess of 25% of the flow of the stream and unless appellant is enjoined, diversion in excess of 25% of the flow of the stream will be made in 1956.

5. That such excess diversion will result in irre-

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202 R. 159.
203 R. 166.
204 R. 162.
205 R. 163, 165.

parable damage and injury to the appellees who are farming the property involved and have been adjudicated to be the owners of 75% of the flow of Ahtanum Creek.

6. Affidavits appearing as Appendix A and B attached,[206] are filed in support of this motion.

WHEREFORE, this appellee prays that this Honorable Court grant an injunction pending the appeal of this cause, maintaining the status quo of the respective parties in the flow of Ahtanum Creek at the amount determined and adjudicated, to-wit, 25% to the appellant and 75% to the appellees, or, in the alternative, that this Honorable Court solely for the purpose of granting such injunction, authorize and direct a hearing on this matter by the United States District Court, for the Eastern District of Washington, Southern Division, to determine the question of the necessity for the issuance of said injunction pending the appeal of this cause.

/s/ FRED C. PALMER
/s/ CHARLES L. POWELL
/s/ J. W. McARDLE

Attorneys for Appellee
Ahtanum Irrigation District

506 Miller Building
Yakima, Washington

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206 Appendix C in this brief.

IN THE UNITED STATES
COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Appellant

vs.

AHTANUM IRRIGATION DISTRICT,
et al.,
Appellees.

No. 14714

MEMORANDUM IN SUPPORT OF MOTION FOR INJUNCTION

This Honorable Court has jurisdiction to entertain this motion for injunction.

Federal Rules of Civil Procedure, Rule 62 (g):

"(g) Power of Appellate Court not Limited. The provisions in this rule do not limit any power of an appellate court or of a judge or justice thereof to stay proceedings during the pendency of an appeal or to suspend, modify, restore, or grant an injunction during the pendency of an appeal or to make any order appropriate to preserve the status quo or the effectiveness of the judgment subsequently to be entered."

The Appellate Court has jurisdiction and authority to grant a stay to maintain status quo.

Breswick & Co. v. U. S., 75 S. Ct. 912; 100 L. Ed. (advance P. 36).

While the Court is recognized to have the power, injunction will not issue if administrative remedies offer ample protection to the appellants' rights and until those remedies are exhausted.

Twentieth Century Airlines vs. Ryan, (1953) 74 S. Ct. 8, 11; 98 Law Ed. 1143.

In this case there is no administrative procedure available to the appellees. The District Court entered a judgment on Findings of Fact and Conclusions of Law which determined that the plaintiff's rights had been lost by contract, by laches, by a State adjudication and by failure to prove the appurtenance of the water claimed.[207]

See opinion in *U. S. v. Ahtanum Irrigation District,* 124 F. Supp, 818.

Where the question is whether an injunction should be granted the irreparable injury facing the parties must be balanced against competing equities before an injunction will issue.

Yakus v. U. S. (1944) 321 U. S. 414, 64 S. Ct. 660, 674, 675.

Public Utilities Commission vs. Capital Transit Co., 214 F. 2d. 242, 245. (D. C. Cir. 1954).

The Court of Appeals may by its order remand the proceedings to the District Court for determination of equities and irreparable injury and for the granting of injunction.

U. S. v. El-O-Pathic Pharmacy, (9th Cir. 1951), 192 F. 2d 62, 79.

An injunction should issue pending appeal in order

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[207] R. 159, 167.

to preserve the fruits of the litigation and to further the interests of justice.

Plomb Tool Co. vs. Fayette R. Plumb, Inc. (9th Cir. 1949), 171 F. 2d. 945, 946.

CONCLUSION

The appellees respectfully request that this Honorable Court order the issuance of an injunction directed to the appellant pending the appeal of this case preserving the status quo, maintaining the parties and their property rights in their position as occupied at the time the judgment was entered, and that in the interests of justice and to preserve the fruits of the appeal for the appellees that the United States of America be restrained and enjoined as herein requested by order issued out of this Court, or in the alternative that this Court cause the same to be heard by the District Court and reviewed and determined by appropriate order therein.

Respectfully submitted,

/s/ FRED C. PALMER
/s/ CHARLES L. POWELL
/s/ J. W. McARDLE

Attorneys for Ahtanum Irrigation District, Appellee

APPENDIX A

THIS MEMORANDUM AGREEMENT, Made this Ninth day of May, 1908, by and between the United States of America, and its assigns, acting in this behalf by W. H. Code, Chief Engineer of Irrigation Indian Bureau, thereunto duly authorized by the Secretary of the Interior, party of the first part, and W. W. Glidden, et al users of water from the Ahtanum Creek on lands located north of and adjacent to the Yakima Indian Reservation, in Yakima County, State of Washington, their heirs, administrators, executors and assigns, acting in this behalf by D. E. Lesh, A. D. Eglin, J. J. Wiley, D. B. Greenwalt, William H. Moyer, C. P. Swain, and H. D. Winchester, their duly appointed and constituted attorneys, party of the second part, WITNESSETH,

THAT WHEREAS the parties hereto claim certain quantities of water in the Ahtanum Creek, County of Yakima, State of Washington, and a right to divert the same for irrigation purposes; and

WHEREAS, a dispute exists as to the extent of the respective rights of the said parties in and to said water.

Now, THEREFORE. the parties hereto, in order to avoid litigation and in order to limit and define their said respective rights in and to the waters of the said Ahtanum Creek, do mutually covenant and agree as follows:

ARTICLE 1. The party of the first part agrees to limit and define its claim to the waters of Ahtanum Creek and its tributaries as twenty-five per cent (25%) of the natural flow of said Creek, and the party of the second part agrees to limit and define its total and aggregate claim to the said waters as seventy-five per cent (75%) of the said natural flow of said stream, each party hereto surrendering and conceding to the

other party all rights heretofore claimed in the said waters in excess of the amounts herein named.

ARTICLE 2. It is understood and agreed that the Secretary of the Interior may appoint a competent hydrographer to measure the water in said Ahtanum Creek and to determine the amount thereof to which the party of the first part is entitled, at any and all times, by virtue of his agreement.

ARTICLE 3. It is further understood and agreed that the waters flowing in said Ahtanum Creek shall be measured at a point on said stream locally known as The Narrows, located about one-fourth of a mile west of the point of intersection of said stream with the west line of Section 14, Township 12 North, Range 16, E.W.M. in said County and State. To the amount thus ascertained to be in said stream at said point shall be added the amounts of water diverted from said Ahtanum Creek, including its North and South Forks, so-called, above said point of measurement. The total amount of water thus ascertained shall be deemed the natural flow of Atanum Creek and the party of the first part shall receive twenty-five per cent (25%) thereof as the amount of said waters to which it is entitled by virtue of this agreement, for use on its lands south of said stream; provided, however, that if it appears at any time that there is an appreciable seepage or return flow to the main channel of said stream below said point of measurement, then such seepage or return flow shall be divided between the parties hereto in the same proportion as herein provided for the division of the natural flow of said stream.

ARTICLE 4. It is further understood and agreed that the parties hereto may divert the low water flow, or any part thereof, of said stream, to which they are entitled under the provisions of this agreement, in main canals from any point or points on their respective sides of said stream below the point of measure-

ment hereinbefore located and locally known as The Narrows. If, however, it should be determined in the future by either party hereto, to construct a main canal with its heading at any point between said Narrows and the junction of the north and south channels of said stream, located in Section 13, Township 12 North, Range 16 East W. M., the other party hereto shall have the election to join in the construction of that portion of said canal above the junction of the north and south channels aforesaid, which said portion shall be constructed with a capacity sufficient and shall serve to carry the total amount of water diverted by both parties. The cost of the construction of such portion of said canal as may be so jointly constructed shall be borne by the first and second parties in proportions of one-fourth and three-fourths respectively, and the cost of maintenance and repair of the same shall be borne in like proportions. In case such canal shall be located on the south side of said stream, the party of the first part will furnish a right of way therefor between the points named. If, however, said canal should be located on the north side of said stream, the right of way therefor between the points named, shall be furnished by the party of the second part.

ARTICLE 5. It is further understood and agreed that wherever water is diverted from the main channel of Ahtanum Creek by one or more of the water users hereinbefore referred to, or by the party of the first part, a substantial headgate shall be installed and maintained by said water user or water users or by the party of the first part, as the case may be, which headgate shall be of such construction that it can be adjusted and locked by the ditch master hereinafter provided for, and such water user or water users and the said party of the first part shall install and maintain as near as practicable to such headgate a suitable measuring device which shall be a cipoletti weir where practicable.

For the purpose of the division of the waters of the

Ahtanum Creek as herein provided for, each of the said parties hereby agrees to appoint on or before the fifteenth day of June of each and every year, a ditch master, whose duty it shall be to so close, regulate, or adjust the headgates of the party so appointing him that no more water will be diverted from said Ahtanum Creek by the parties hereto than said parties are respectively entitled to under the provisions of this agreement, and the ditch masters thus appointed are hereby clothed with all necessary authority to do and perform any and all acts necessary to the proper division of said water, and to that end shall receive orders and instructions from the hydrographer appointed by the Secretary of the Interior as to the amounts to which each of the parties hereto is entitled from time to time; provided, however, that nothing contained in this Article shall be construed as settling the rights of the various water users as to their respective rights to the use of water herein conceded to said second party.

ARTICLE 6. It is further understood and agreed that the water herein divided between the parties hereto may be used for domestic, power, stock, and irrigation purposes.

ARTICLE 7. No Member of or Delegate to Congress, officer, agent or employee of the Government is or shall be admitted to any share or part of this contract, or to any benefit which may arise therefrom, and sections 3739, 3740, 3741, and 3742 of the Revised Statutes of the United States, so far as same may be applicable, are part of this contract.

IN WITNESS WHEREOF, the parties have hereto signed their names the day and year first above written.

W. H. CODE
Chief Engineer of Irrigation Indian Bureau,
For and on behalf of the United States of America, Party of the first part.

W. W. GLIDDEN, et al

D. E. LESH
A. D. EGLIN
J. J. WILEY
D. B. GREENWALT
WILLIAM H. MOYER
C. F. SWAIN
H. D. WINCHESTER
Their Attorneys in fact, Party of the second part.

STATE OF WASHINGTON:
County of Yakima ss.

I, John H. Lynch, a Notary Public in and for said County and State, do hereby certify that personally appeared before me D. E. Lesh, A. D. Eglin, J. J. Wiley, D. B. Greenwalt, William H. Moyer, C. F. Swain, and H. D. Winchester, personally known to me to be the individuals who executed the withinhand foregoing instrument of writing as Attorneys in fact for and on behalf of W. W. Glidden, et al. The principal names in said instrument, and each for himself and not one for the other, acknowledged to me that he executed the same as the free and voluntary act and deed of the said principals and each of them for the uses and purposes therein mentioned.

IN WITNESS WHEREOF I have hereunto subscribed my name and affixed my official seal this ninth day of May, 1908.

(Sgd) JOHN H. LYNCH
Notary Public in and for the State of Washington, residing at North Yakima, Washington

SEAL

Approved this 30th day of June, 1908.

FRANK PIERCE
First Assistant Secretary of the Interior

APPENDIX B

Plaintiff's Exhibit No. 11-113 — Exhibit "I"

DEPARTMENT OF JUSTICE
OFFICE OF UNITED STATES ATTORNEY
for the
Eastern District of Washington
Spokane

May 11, 1907

H. J. Snively, Esq.
Attorney at Law,
North Yakima, Wash.

Sir:

I am in receipt of yours of the 4th inst. containing copy of third amended complaint in the case of Munn against Redman, and others. It has occurred to me that if it is desired to settle the Government's rights in Ahtanum Creek, it would be a better plan to bring the case in the federal court, or permit me to get permission to bring a case on behalf of the Government. Whatever the result of this action may be, the rights of the Government and a large number of other defendants leasing Indian lands will not be, I believe, determined. If you should prevail in this litigation, I cannot see than my client, Mr. Redman, will be affected, because all that he does, as I understand it, with the water of Ahtanum Creek is done for and on behalf of the United States. While I am speaking without any authority, I have no doubt that it would be well to settle the rights of the people and the Government to the waters of the creek, but inasmuch as

the case involves so much, and so many people, I think that the decision ought to conclude everyone, but as stated before, it does not seem to me that it will be done in this action, for the Government does not appear in a state court. If it should seem to you that there is anything in my suggestions that is entitled to further consideration, I shall be glad to take the matter up with you. I am satisfied that neither desires to have two big law suits where one will do as well.

I am sending you herewith a demurrer to the amended complaint, on behalf of the defendant Redman. Please acknowledge receipt.

Respectfully,

Enc. A. G. AVERY

Plaintiff's Exhibit 11-113 — Exhibit "J"

Law Offices of
H. J. SNIVELY

North Yakima, Washington
May 18, 1907

Hon. A. G. Avery,
U. S. District Attorney
Spokane, Washington.

Dear Sir:

Your favor of May 11th has been received relating to the Munn-Redman case, and its contents have been carefully noted. I have deferred from answering the same

until I could have a conference with my clients, which I had upon yesterday.

I will agree to dismiss the present case as far as Mr. Redman is concerned providing you immediately file a bill in behalf of the United States to determine the questions involved and agree that the same may be heard at the coming June term of Court at North Yakima. There will be nothing but a question of law involved in this case. The United States for the past three months have had a corp of surveyors surveying out and locating the ditches taken out on the north side of the creek and are platting the same, with a view as I understand it, of using the same in this suit. There will not be the slightest difficulty about us agreeing to the facts in the case, and consequently there need be no testimony taken at all, but the question of law alone, as I view the case, will determine. It is very necessary that this be done immediately for many reasons. One of the most important of which is this: If the United States were to prevail in this suit to the extent that the claim is made in behalf of the Indians there could not be a drop of the Ahtanum waters used upon any lands for the purpose of irrigation, not even, the Indian lands. If this is the law, it should be determined before the Government Tieton Irrigation Project has gone so far that the ditch could not be enlarged to carry water sufficient to irrigate the whole Ahtanum Valley, including the portion of it within the Indian Reservation, as this would be the only hope in the event re-

ferred to, of irrigaing this land and in this connection as you are not acquainted with this country I wish to say: That the lands on the north side of the Ahtanum Creek have been irrigated beginning in 1867 down to the present time from the waters of Ahtanum Creek and it is safe to say that the value of the farms and improvements on the north side of the Ahtanum at the present time will exceed a half million dollars, including valuable orchards, hop yards, meadows, many handsome dwellings, school houses, etc. I had always hoped and still hope that the Indian Department will see its way clear to provide for the irrigation of those Indian lands, none of which have been cultivated until within the last few years, from the Tieton Ditch. In 1889 a suit was brought by the appropriators of water from the Ahtanum Creek to settle the rights thereof among the persons owning lands on the north side of the creek and after expensive litigation a decree was entered. It being the decree known as the decree in the case of Benton v. Johncox, which was appealed to the Supreme Court of the State of Washington, and there affirmed. Reported in 17 Washington, page 277. I am now engaged in enforcing that decree and have been for some six months past. This decree was of course supposed to settle the water rights on the entire Ahtanum. At the time the suit was begun and decided no water was being taken out on the Reservation. . . . . .

I have at great length presented this matter to you

with the hope of through your good offices having this matter presented to the Indian Department in such a way that a speedy determination of this question along such lines that will subserve the interests of all parties will be speedily obtained. I remain,

Yours very truly,
H. J. Snively

Plaintiff's Exhibit No. 11-113 — Exhibit "K"

DEPARTMENT OF JUSTICE
OFFICE OF UNITED STATES ATTORNEY
for the
EASTERN DISTRICT OF WASHINGTON
Spokane.

May 21, 1907

H. J. Snively, Esq.
North Yakima, Wash.

Dear Sir:

I have yours of the 18th inst. in the matter of Munn against Redman, and others, and note that you say therein you will dismiss the case as to Redman if I will immediately file a bill in behalf of the United States to determine the questions involved so that it can be disposed of at the coming term at North Yakima. I cannot file a bill of that character without the approval of the Department of Justice, and I doubt if such approval could be secured in time to dispose of the matter at the next Yakima term which will be in a little over two weeks. Everything would depend upon the promptness with which

the matter would be disposed of in Washington, but I feel confident that the authority could not be secured in so short a time. It seems to me that inasmuch as no jury will be required, it is not imperative that the case should be disposed of while Judge Whitson is at North Yakima on the 11th of June. It will be such a case as he can take up at any time.

If you do not see fit to dismiss Mr. Redman, I am glad that you say there will not be any difficulty about agreeing as to the facts, and that no testimony need be taken at all, and that according to your view a question of law alone remains to be determined. That will expedite matters materially as to the merits if it becomes necessary to consider them. I doubt very much that there is any jurisdiction in the court to try the case as to Redman, the reservation lands, or allotments.

Respectfully,

A. G. AVERY

Plaintiff's Exhibit No. 11-14

DEPARTMENT OF JUSTICE
Carbon Copy for the Files

87866 GM

A. G. Avery, Esq., July 30, 1907

United States Attorney,

Spokane, Washington

Sir:

Herewith is returned to you, duly signed, the original

bill in equity having for its object the settlement of the use of the waters of Attah-num Creek, Washington.

The Department concurs in the scope and form of the bill. When you shall have ascertained the names of the defendants please send them to the Department so that the copy of he bill which it has retained may be made complete.

Respectfully,

Attorney-General

Inclo. 18452.

Plaintiff's Exhibit No. 11-17

DEPARTMENT OF JUSTICE
Carbon Copy for the Files

August 12, 1907

87,866

United States Attorney,

Spokane,

Washington.

Unless statute of limitations or some other question prevents, do not file bill in equity in Ahtanum Creek matter until further notice.

(Sub Delay)

124838
87866 FILE

Plaintiff's Exhibit No. 11-6

DEPARTMENT OF THE INTERIOR
Chief Engineer, Indian Service,
(Irrigation)

522 Bumiller Bldg.
Los Angeles, Cal.
Oct. 17, 1907

The Secretary of the Interior,

Washington, D. C.

Sir:

In company with Mr. Jas. F. Allen, of the Indian Office, I recently visited the Yakima Reservation, Washington, to inspect work performed on canal extensions during the fiscal year 1907, finding the same to be very satisfactory, although limited in extent, owing to the small appropriation expended, viz: $15,000.

In accordance with your instructions, as verbally given, an investigation was made of conditions along the Ahtanum Creek, a reservation boundary stream, apropos of the contemplated suit brought by the Department of Justice on behalf of the Indians against the white settlers diverting water therefrom.

I have been informed that action on this suit has been postponed by the U. S. District Attorney, on advice from Washington, with a view, presumably, of allowing the litigants time in which to effect a compromise, if possible, in which event further litigation would be unnecessary. . . . .

GENERAL DATA RELATIVE TO AHTANUM VALLEY.

The results of Engineer Noble's investigation show the respective areas farmed in 1907 in the Ahtanum Valley to be as follows:

Indian lands on south side of Creek	1500	acres
Total capacity of Indian Ditches	25	Sec. feet
Total number of Indian Ditches	12	
White holdings irrigated, not including some additional bench lands irrigated during flood periods	5500	acres
Total capacity of ditches (Whites)	273.6	Sec. feet
Total number of ditches (Whites)	166	
Capacity of ditches (whites) for which no acreage is tabulated by Noble	68.86	sec. ft.

* * * * * *

NATURE OF COMPROMISE RECOMMENDED.

As a result of our investigations and conferences the only character of a compromise agreement that seemed feasible was a division of the waters of Ahtanum Creek based upon the relative areas actually irrigated, by the Indians on the south side, and the white settlers on the north, to which latter has been previously adjudicated the entire low water flow of the creek. It would not be necessary to attempt any compromise with the remaining white settlers, owning simply high water rights in the creek, since there are no disputes over such rights.

Engineer Noble's table not showing the acreage farmed under every canal on the north side, I wired Engineer Redman, asking that he have Mr. Noble submit an esti-

mate of the lands irrigated on each side of the creek, receiving in answer the following:

N. Yakima, Wn. Oct. 11, 07

"Indian side irrigated 1500 acres. White side 5500 acres. Some more partially irrigated high land white side during high water periods, Nobles figures.

Redman."

A subsequent telegram received on October 15th. from Mr. Redman is as follows:

"My personal examination finds 1680 acres Indian land irrigated from Ahtanum Creek. Close estimate.

Redman."

From the above data the Indians are irrigating between one third and one quarter of the amount irrigated by the whites, and I would recommend therefore that an attempt be made to adjust this matter out of court upon the basis that during the low water period of the Ahtanum Creek one third of the supply be apportioned to the Indians, and two thirds to the white settlers now claiming rights to said flow. This division is a little in favor of the Indians upon the basis of respective areas irrigated, as one quarter of the flow would apparently be nearer the mark, but it would be well to place the amount at one third, since it is probable that no more strenuous objections will be offered than if a smaller proportion were suggested.

If, during the progress of negotiations, matters so shape themselves that no basis of compromise will be

entertained by the white settlers who hold prior rights, other than a division of the waters based upon the exact acreage now irrigated on the respective sides, I would recommend the acceptance of such terms by the Indian office, rather than to continue litigation, the relative areas irrigated to be determined and agreed upon by an engineer of the Indian Service and one appointed by the Ahtanum Water users. These men to have the privilege of calling in a third engineer, in case of dispute.

The Reclamation Engineers in charge of the Yakima Project are very anxious that litigation may be avoided on the Ahtanum, fearing that a start made in this direction might ultimately spread to the Yakima Valley, and involve the country in a sea of litigation which might stop all Reclamation work. They, and the capable young Government Attorney, Mr. Williamson, will lend the Indian Office all the assistance possible in any negotiations undertaken. It will not be an easy task at best, and will probably be an impossible one, unless Attorney Sniveley fully appreciates that, in view of the recent Montana decisions, especially that of the United States vs. Conrad Investment Co., the Department is offering very fair terms.

He should realize that if litigation is continued there would be a possibility of his clients in the Ahtanum Valley being wholly dispossessed of their water rights during the low water period, which would mean the ruination of one of the earliest settlements in the Yakima district.

The Department is the best judge of how far it would be advisable to use the power which would be given it, in event that the Montana decisions were sustained by the U. S. Supreme Court. To a layman, it seems that, as between the early white settler, who has made prior and beneficial use of the waters of a boundary stream, and the Government, which, as guardian of the Indians' water rights, had not done so, the latter would be the party to make restitution to the Indians. . . . .

In making an effort, however, to effect a reasonable compromise, though it be unsuccessful, the Department will have shown a disposition to treat the pioneer water users of the valley fairly, and if they reject such overtures, they will have less cause for complaint in the future, should litigation be continued, and the case go against them.

Very respectfully,

/s/ W. C. CODE

L.S. Chief Engineer.

Copy to Director Rec. Service.

SECRETARY'S OFFICE
DEPARTMENT OF THE INTERIOR
WASHINGTON, D. C.

JIP-K October 24, 1907

Sir:

I am handing you herewith a report from Chief Engineer Code, dated the 17th instant, in relation to irriga-

tion matters in the Yakima Reservation, and bearing especially upon the dispute existing between the present users of water on the north side of Ahtanum Creek and the Government on behalf of the Reservation.

I would be glad if you would convey to me at the earliest practicable date, with such recommendations as you may deem advisable, your views concerning the suggestions made by Inspector Code relative to said matter.

Very respectfully,

/s/ JAMES RUDOLPH GARFIELD
Secretary.

The Commissioner of Indian Affairs.

Encl. 348

Plaintiff's Exhibit No. 11-18

DEPARTMENT OF THE INTERIOR
OFFICE OF INDIAN AFFAIRS
Washington

Refer in Reply
to the following:

October 28, 1907

Field Work
85193-1907

Subject: Dispute between
Indians of Yakima Reservation and settlers on the
north side of Ahtanum Creek.

Superintendent in Charge,

Yakima Agency,

Fort Simcoe, Washington.

Sir:

In a report, dated October 17, relative to irrigation matters on the Yakima Reservation and especially as to the dispute with the water users on the north side of Ahtanum Creek, Chief Engineer Code recommended that an attempt be made to adjust the matter out of court upon the basis that during the low water period of Ahtanum Creek one third of the supply be apportioned to the Indians and two thirds to the white settlers now claiming rights to said flow.

This recommendation has been approved by the Department and you are instructed to confer with Supervising Engineer Henny, of the Reclamation Service, and arrange with him to meet in conference with Attorney Snively, who, it is understood, represents the settlers, in order to ascertain the feasibility of effecting a compromise along the line suggested, and, if possible, to obtain the written consent of the settlers in interest.

In the event of failure of negotiations on this basis, the Department would be willing to accept a division based on the exact acreage now irrigated on the respective sides of the creek, the areas to be determined and agreed upon by an Engineer of the Indian Service and one selected by the Ahtanum water users, these two to have the privilege of calling in a third engineer in case of dispute.

This basis however should not be offered or accepted until the one-third and two-thirds divisions has been ab-

solutely rejected. Mr. Code says that the Reclamation Engineers in charge of the Yakima project are very anxious that litigation on the Ahtanum shall be avoided, and with the attorney of that Service, Mr. Williamson, will lend the Indian Office all the assistance possible in any negotiations that may be undertaken.

I desire you to take this matter up in connection with the Reclamation Service along the lines suggested as early as practicable and to spare no effort to effect the compromise.

If it should develop that the presence of Mr. Code would be of material assistance in connection with the negotiations you will so advise the Office by telegram that the necessary orders may be given him without delay.

For your further information I enclose a copy of his report.

He has been requested to submit an estimate of the cost of sinking wells to test the possibility of increasing the water supply by developing the underground waters.

Very respectfully,

(Copy) F. E. LEUPP

JFA-CJI

Commissioner.

Plaintiff's Exhibit No. 11-19

Dispute between Indians on Yakima Reservation and settlers on the North side of Ahtanum Creek. JL-PLH.

North Yakima, Wash., January 9, 1908

Mr. A. G. Avery,
United States Attorney,
Spokane, Wash.

Dear Sir:

I enclose copy of a letter received from the Department some time ago in reference to submitting a proposition to the water users of Ahtanum Creek to settle the question of water rights in said creek out of Court. Also copy of Mr. Code's report in reference to the matter which possibly may be of some use to you, and which explains conditions as he views them. On the strength of this report the proposition of settlement was made. . . . .

I have conferred with Mr. Snively and other lawyers interested and they desire first to have the attorneys meet together and discuss whether to advise their clients to accept such a proposition or not. They say they would very much like to have you with them at this meeting when it is held, (I suppose with the idea that you present the claims of the Government, or the claims of the Indians to the water of Ahtanum Creek.)

The Reclamation people are interested and will do all they can to assist in bringing about a settlement and

Mr. Williamson, as well as the attorneys for the water users, are very anxious to have you with us at this meeting, for we believe you can very greatly assist us in arriving at a settlement and we therefore ask you to consent to be present at this conference. . . . .

Respectfully yours,

Encs. 2. Supt. & S. D. A.

Plaintiff's Exhibit No. 11-113 — Exhibit "L"

SECRETARY'S OFFICE
DEPARTMENT OF THE INTERIOR
Washington, D. C.

January 29, 1908

Dear Sir:

I have been considering the question of the use of the water of Ahtanum Creek upon the Indian Lands, and the claims of the white settlers on the opposite side of the Creek.

It is clear to me that the time has come for a final settlement of these adverse claims, but I am advised that the settlers have not an organization which represents all their different interests. If the settlers will appoint a

committee and clothe it with full power to act for all the different interests, I will be in a position to immediately confer with the committee and effect a final settlement of the different rights. Unless such a committee be immediately formed and clothed with the requisite power, it will be necessary for me, as representing the Indians, to begin an action in court to determine definitely their rights.

It is surely to the best interests of all concerned that this matter be settled by agreement rather than as a result of litigation. The settlers will find, as I told them last summer, that the Indian Office desires to meet them half way in effecting a fair settlement. but, as you will readily understand, it is quite impossible for the Government to attempt to deal individually with these settlers. Any agreement made with one would necessarily be without binding effect upon any of the others. In order to make a definite proposition, will you please say to the representatives of all the interests that unless the committee is organized in the manner I have indicated on or before March 15th, it will be necessary for me to immediately take up the question of a bill in equity.

In this connection, you may say to all the persons interested that they must place no dependence whatever upon water being furnished to them from the Tieton Canal. I am convinced by the reports of the engineers of the Reclamation Service that it would be most unwise to make

even a suggestion, much less a promise, that water may be furnished from that source to lands at present irrigated from Ahtanum Canal.

Very truly yours,
JAMES RUDOLPH GARFIELD
Secretary

Mr. H. J. Snively
North Yakima, Wash.

Plaintiff's Exhibit No. 11-21

DEPARTMENT OF THE INTERIOR
United States Indian Service

Yakima Indian Agency,
Ft. Simcoe, Washington
April 9, 1908

Subject:
Dispute between Yakima
Indians and white settlers
as to water of Ahtanum Creek.

Honorable Commisioner of Indian Affairs,
Washington, D. C.

Sir:

Referring to previous correspondence of your Office under date, Oct. 28, 1907, "Field Work, 85193," and letter of Jany 2nd, 1908, in reference to securing settlement of the division of the water of Ahtanum Creek, will state that some time since I reported to your Office that the water users of said creek held a meeting and appointed

a committee to act for them, etc. And this committee now reports to me as follows:

North Yakima, Wash.
April 8, 1908

"Mr. J. Lynch,
Supt. and Disbursing Agent,
Yakima Indian Reservation,
Ft. Simcoe, Wash.

Dear Sir:

The committee selected to adjust the water claims of the water users along the Ahtanum, with the Yakima Indians, have been working very diligently to get all the signatures of the claimants to the Power of Attorney to the Committee of Adjustment. But, owing to the absence of a few of the claimants, we have as yet failed to get quite all of the signatures.

However, we now think that by the time an agent can reach here to represent the Government and the Indians, we shall have secured the signatures.

Yours respectfully,

(signed by) . . . . THE COMMITTEE."

In view of the representations made by this committee; and to my personal knowledge, they have secured practically all of the water users signatures granting this committee authority to act for them, I would request that Mr. Code be directed to come here, at once, to confer with this committee and enter into an agreement with them, under such instructions as your Office may deem advisable to give him.

If it is not practical to have Mr. Code come, some other representative of the Department might do, but as

Mr. Code is familiar with all the conditions, I hope he can be designated as the agent of the Department to act with the committee in this matter.

Very respectfully,
/S/ JAY LYNCH
Supt. & S. D. A.

JL—a

Plaintiff's Exhibit No. 11-23

Field Work
24714-1908
JFA
Subject: Compromise with
Ahtanum Creek water users. April 13, 1908

W. H. Code. Esq.,
Chief Engineer,
Yakima Agency,
Fort Simcoe, Washington.

Sir:

Referring to your report of October 17, 1907, relative to irrigation matters on the Yakima Reservation, especially in regard to conditions along Ahtanum Creek, and the letter of the Commissioner of Indian Affairs, dated October 28, enclosing a copy of the instructions given Superintendent Lynch, on January 29 I advised J. H. Snively, attorney for a number of the settlers, that if they would appoint a committee and clothe it with full power to act for all the different interests, I would be in a position to immed-

iately confer with the committee and effect a final settlement of the different rights.

Also, I asked him to say to the representatives of all the interests that unless the committee was organized in the manner I had indicated on or before March 15, it would be necessary for me to immediately take up the question of a bill in equity.

On March 5 Superintendent Lynch reported that at a meeting of practically all the persons interested, at which the sentiment appeared to be practically unanimous to settle the matter out of court, a committee was selected, but that it was deemed necessary and advisable that a power of attorney be signed by all the water users giving the committee full power to enter into an agreement.

Mr. Lynch said it would require some little time to procure the signatures to this instrument but thought it could be completed by the first of April.

He said also that it was the sense of the meeting that when the power of attorney had been signed, that I appoint some person to confer with the committee and enter into an agreement in writing.

He suggested you as the proper person for this purpose.

On March 14 Superintendent Lynch was advised by the Indian Office that on March 13 the Department had

extended the time within which the committee must organize, with full power to act, from March 15 to April 10.

On April 11 he telegraphed the Commissioner of Indian Affairs:

> "Referring yours March fourteenth reference settlement waters of Ahtanum Creek committee reports that by time agent of Department can reach here they will have secured the signatures granting committee power to act. I recommend Mr. Code be sent here soon as possible with instructions forwarded him here."

On the 13th I telegraphed you:

> "Proceed immediately to Yakima Agency and take up with Superintendent Lynch Ahtanum Creek matter. Letter will be mailed you at Fort Simcoe."

If the signatures are secured as indicated in Mr. Lynch's telegram, this will be accepted as a substantial compliance with my letter of January 29 as modified on March 13.

You will please take up the matter with Superintendent Lynch and the settlers interested along the lines indicated in your report of October 17 and endeavor to secure an agreement by which two-thirds of the waters of Ahtanum Creek during the low water period shall be apportioned to the settlers claiming rights to the low water flow, and one third to the Indians.

In the event of failure to secure an agreement on this basis you are authorized to sign an agreement for a

division of the low water flow based on the exact acreage now irrigated on the respective sides of the creek, but the one-third and two-thirds basis must first be pressed to the limit, and the alternative accepted only when it is certain that an agreement to the first proposition cannot be obtained.

If you think it necessary or advisable you will consult the local officers of the Reclamation Service, who will doubtless be pleased to give you any assistance in their power.

Respectfully,

/s/ JAMES RUDOLPH GARFIELD

CJI Secretary.

Plaintiff's Exhibit No. 11-25

JIP-M SECRETARY'C OFFICE
DEPARTMEMNT OF THE INTERIOR
WASHINGTON, D. C.

May 4, 1908

Sir:

I am handing you herewith a report from Chief Engineer Code, dated North Yakima, Washington, April 28, 1908, with its enclosure and map in separate tube, relative to the Ahtanum Water situation. Kindly advise me of your views concerning the agreement transmitted herewith which has been submitted for my approval, together

with any suggestions you may desire to make. Return papers with your reply.

Very respectfully,

/s/ James Rudolph Garfield
Secretary.

The Commissioner of Indian Affairs.
Encs. No. 1036.

Plaintiff's Exhibit No. 11-26

Refer in Reply to the following:

Field Work
30200-1908
JFA
Subject: Proposed Agreement with water users of Ahtanum Valley.

DEPARTMENT OF THE INTERIOR
OFFICE OF INDIAN AFFAIRS
WASHINGTON

May 5, 1908

The Honorable,

The Secretary of the Interior.

Sir:

The Office has received your letter of the 4th transmitting a report from Chief Engineer Code, with enclosures and map, relative to the Ahtanum Creek water situation, and requesting my views concerning the form of agreement submitted for your approval, together with any suggestions I may desire to make.

In response, the proposed agreement has been carefully examined.

It appears to cover the situation and to safeguard the interests of all concerned upon the basis authorized in your telegram of April 24 to Mr. Code.

I have the honor to recommend that it receive your approval and that Mr. Code be so advised by wire.

A telegram for your signature is herewith transmitted.

Very respectfully,

CJI /s/ C. F. Larrabee

Acting Commissioner

Telegram.

Code, May 5, 1908

Chief Engineer

North Yakima, Washington

Your letter April twenty-eighth. Form of agreement with Ahtanum water users has my approval.

/s/ JAMES RUDOLPH GARFIELD

Secretary.

Plaintiff's Exhibit No. 11-28

DEPARTMENT OF THE INTERIOR
OFFICE OF INDIAN AFFAIRS,
WASHINGTON.

Refer in reply to the following: June 27, 1908

Field Work
34564-1908
42782-1908
JFA
Subject: Agreement with
Ahtanum Creek water users.

The Honorable,

The Secretary of the Interior.

Sir:

On October 28, 1907 the Office, with the approval of the Acting Secretary, instructed Superintendent Lynch of the Yakima Agency to confer with Supervising Engineer Henny and arrange with him to meet in conference with Attorney Snively in order to ascertain the feasibility of effecting a compromise with the settlers on Ahtanum Creek (a boundary stream of the Yakima Reservation) upon the basis that during low water flow 1/3 of the supply be apportioned to the Indians and 2/3 to the settlers and if possible to procure the written consent of the settlers in interest.

On January 2, 1908 report was made to the Department regarding the progress of the negotiations and Supt. Lynch was instructed to continue his efforts to effect a compromise.

On January 29 you wrote Mr. Snively that if the settlers would appoint a committee and clothe it with full power to act for all the different interests, you would be in position to confer immediately with the committee and effect a final settlement of the different rights. You requested him to say to the representatives of all the interests that unless the committee was organized on or before March 15 it would be necessary for you to take up immediately the question of a bill in equity.

On March 13 the time was extended to April 10.

On April 13 you directed Chief Engineer Code to go to the Yakima Agency and assist Supt. Lynch in the negotiations.

On April 24 you telegraphed Mr. Code that he might accept a proposal to compromise on the basis of ¼ of the low water flow for the Indians and ¾ for the settlers.

On May 4 you transmitted to the Office a report from Chief Engineer Code with a form of agreement submitted for your approval.

On May 5 the Office recommended that you approve the agreement and on the same date you telegraphed Mr. Code that the form of agreement had your approval.

On May 23 the Office received, by reference from the Reclamation Service, "for appropriate action," Mr. Code's report of May 10 with the agreement duly executed in duplicate and two copies thereof verified by his affidavit. Mr. Code also enclosed a certificate of the committee and its attorney certifying to the ownership of the lands involved and a list of the present owners of the riparian lands to which the waters of Ahtanum Creek were adjudicated in the decision of Benton vs. John Cox, certified to by a responsibile Yakima Abstract Company. He said that the power of attorney with the signatures of the water users was filed with the County Recorder and would be

forwarded to the Department as soon as the same had been recorded.

The Office is now in receipt of a letter from Supt. Lynch, dated June 20, with which he transmits a copy of the special power of attorney, certified by the County Recorder, from whose certificate it appears the power of attorney has been duly recorded.

The papers now appear to be complete and are transmitted herewith with the recommendation that you approve the contract in duplicate and return the same with the copies to this Office for appropriate disposition.

Very respectfully,

/s/ C. F. LARRABEE
Acting Commissioner

CJI

Plaintiff's Exhibit No. 11-36

DEPARTMENT OF THE INTERIOR
WASHINGTON

Jan. 23, 1913

The Director of the Reclamation Service,
The Commissioner of Indian Affairs.

Sirs:

With reference to the problem of irrigation for the allotted lands in the Yakima Indian Reservation (Wapato unit of the Yakima reclamation project):

In view of recent communications from and conferences with officers of your several bureaus, I deem it

opportune to restate in this letter for future guidance of you and your subordinates the policies definitely determined upon by me after full conference with the heads and legal officers of each Bureau.

(1) Secretary Hitchcock had lawful authority to limit the rights of the Indians in the low water flow of the Yakima River, and his limitation thereof to 147 cubic feet per second, which was a part of the general settlement of water rights in the Valley, is valid and binding. Any other conclusion would involve the acceptance of the doctrine that the Indians, by virtue of the treaty of 1853, ratified in 1859, then acquired a vested right in the water flowing in the Yakima River which is undetermined and must forever remain undeterminable as to quantity; for it is contended that it is to be measured at any time by what then appears to be the duty of water for that area of land which, from the economic and engineering standpoints it is then feasible to irrigate; that it must be measured fifty years hence by what then appears the duty of water for the area which it then appears feasible to irrigate; and so for any point of time in the future. This would make it impossible to measure the future water rights of the Indians at any time; would prevent all irrigation development outside of the Indian reservation; and would amount to a reservation of the total flow of the river without any obligation on the part of the Indians

to utilize the water which might thus flow forever unused to the sea. The Indian treaty negotiated in 1853 and ratified in 1859 was to make possible the permanent settlement of the Yakima Indians and their transformation into an agricultural people; to reserve an abundance of land and of water rights out of which the real need of the Indians for farms and for irrigation water for such farms could be satisfied as such needs might be determined by Congress or its duly authorized executive agent. It was not intended to reserve either lands or water rights above that measure, or to restrict the authority of Congress or of the Secretary of the Interior under the authority of Congress to determine the measure of the water rights needed by the Indians. . . . .

The foregoing statement of principles is, of course, subject to modification if additional information or experience shows such modification to be necessary, and you should recommend any change therein that seems to you desirable from time to time. Until such change is made, however, your action and that of your subordinates should be controlled by the principles above stated.

Respectfully,

(Signed) WALLIS L. FISHER

Secretary.

Plaintiff's Exhibit No. 13-J

EXHIBIT A

Refer in reply to the following: 5-1100

Irrigation
85193-07
F. L. S.

Address only the
Commissioner of Indian Affairs

DEPARTMENT OF THE INTERIOR
OFFICE OF INDIAN AFFAIRS
WASHINGTON

Jan. 15, 1919

Mr. Marvin Chase,

State Hydraulic Engineer,

Olympia, Washington.

My dear Mr. Chase:

The office is in receipt of your letter dated January 7, 1919, in further reference to the contract between the United States and numerous water users along Ahtanum Creek, dated May 9. 1908 and approved by the First Assistant Secretary of the Interior June 30 of that year.

Supervising Engineer L. M. Holt has been directed to carry out his operations on behalf of the Government in accordance with the terms of the aforesaid contract. In view of your earnest protestations with respect to this matter, the Office feels that it is justified in asking that you shall take such steps with respect to the white water users, who are parties to this contract, as may be necessary to require them to carry out their part of this agree-

ment as scrupulously as the Government shall be expected to do.

Very truly yours,

/s/ E. B. Merritt
Assistant Commissioner.

I-ELM-14

Received:
9:30 a. m.
Jan. 20, 1919
Office State Hydraulic Eng.

Plaintiff's Exhibit No. 13-A

Mar. 27, 1923

Mr. Marvin Chase,
Supervisor of Hydraulics,
Department of Conservation
And Development,
Olympia, Washington

Dear Mr. Chase:

I am in receipt of your communication of February 28, 1923, in further reference to the matter you discussed with me several months ago while I was at Olympia, Washington, regarding the determination of water rights on streams within the State to which Indian allotments are appurtenant.

The streams involved contained in the list of your letter are in whole or in part within Indian Reservations of the State of Washington. The Federal Government has exclusive control over the Indian lands and of sufficient water for irrigation purposes thereof. In this connection your attention is invited to the decision of the Supreme

Court of the United States in the case of Winters vs. United States, reported in 207 U. S. 564. In view of the holding in this case and the holdings in other cases involving Indian matters, this Department is without authority to submit the adjudication of the Indians' water rights to the tribunals of the State of Washington. I wish to assure you, however, that we will be pleased to cooperate with the State officials in so far as possible where infringement of the water rights of the Indians is not involved. It is, therefore, suggested you advise the procedure contemplated to be followed in determining the water rights, other than Indian, of the several streams mentioned. . . . .

Respectfully,

(Sgd.) F. M. GOODWIN
Assistant Secretary.

3 ELM 12
I-18955

Plaintiff's Exhibit No. 11-47

Erle J. Barnes
Director

R. K. Tiffany
Supervisor of Hydraulics

STATE OF WASHINGTON
DEPARTMENT OF CONSERVATION
AND DEVELOPMENT
DIVISION OF HYDRAULICS
Olympia

July 19, 1927

Honorable Hubert Work
Secretary of the Interior
Washington, D. C.

My dear Mr. Work:

Your attention is directed to the enclosed clipping from the Yakima Daily Republic, the occasion for which was an order from Commissioner Burke of the office of Indian Affairs definitely repudiating a contract between the Department of the Interior acting on behalf of the Indian owners of certain lands in the Yakima Reservation on one side and white owners of lands irrigated from Ahtanum Creek on the other, which contract was signed by W. H. Code for the United States and approved by the Secretary of the Interior on June 30, 1908.

Commissioner Burke's order, if carried into effect, would not only destroy this year's crop on some three thousand to five thousand acres of land but would totally and finally condemn as desert the same area of the most fertile and productive lands in the Yakima Valley. The order has since been suspended on request of Senator Jones but with the implication that it will be renewed next year.

On behalf of the owners of these thousands of acres of land including scores of the pioneers of irrigation development in this State and hundreds of their descendants, I wish to urge that the United States Government should keep faith with these settlers and that it do not repudiate this contract on which they have relied for nearly a score of years.

The Yakima Valley has made a truly wonderful irri-

gation development with a minimum of litigation over water rights and this due in no small part to the fact that the Department of the Interior, before approving construction of the Yakima project in 1905, required that all principal appropriators from the Yakima River should agree to limit their claims to the amounts of water then being diverted. This was generally done. The Department, in line with other appropriators, agreed to limitation of its water right for the Wapato project to one hundred forty-seven cubic feet per second. which was reported as the division being made for irrigation on the Wapato project at that time. A few years later. the white man having realized the value of Reservations lands, it became apparent that this amount was far too small and the Congress made an appropriation of $635,000 to furnish stored water to make up the difference between one hundred forty-seven cubic feet per second agreed to and one-half of the estimated low-water flow, which was seven hundred twenty cubic feet per second. This was done as a matter of good faith with the Indians and the whites who purchased or leased land from them.

So that in 1908 when the Ahtanum agreement was signed, it was simply one step in the established program of water right adjustment by agreement rather than by litigation.

It was not, as Commissioner Burke says, a tentative agreement, but it was intended and believed to be by all

interested parties, a permanent settlement between the white owners on one side of Ahtanum Creek and the Indian owners on the other side. Since the agreement was reached it has been substantially complied with on both sides. There have been, perhaps, some unauthorized diversions, but in general the purpose of the agreement has been served.

And please bear in mind, Mr. Secretary, that the agreement as originally made was more than fair to the Indian owners. The division of water was made in proportion to the areas under irrigation at the time, i.e. 1908, on the two sides of the creek. There was no surplus for new development, not enough in fact, in dry years for the area already cultivated.

And furthermore, the appropriation, diversion and use of substantially all of the waters of the stream had been made by white owners on the north side of the creek many years before any irrigation of consequence was started on the Reservation. The first settlers in the Ahtanum Valley began irrigating as early as 1850. The latest ditch to be built of any consequence was the Johncox ditch built in 1884 and it, with earlier ditches, took more than the normal summer flow of the stream at that time though there was then very little or no irrigation from Ahtanum Creek on the Reservation. No considerable amount of Reservation land was irrigated from the creek until after 1900 so that when the agreement was

signed in 1908 the north side farmers actually relinquished the use of water most of which they had been diverting and using for many years.

Since that time there has been no material increase of cultivation on the north side of the stream but a steady increase on the south or Reservation side, this being done largely by white renters or owners, and constantly increasing pressure from these that the contract be repudiated and water taken from the white pioneers to be used on these newly-developed Reservation lands.

In 1923 and 1924, at request of the water users, the water rights of all lands north of Ahtanum Creek and served by it were adjudicated thru this office in the State courts. In that adjudication it was assumed that the agreement of the Secretary of the Interior with the white water users was valid and binding, and water rights were decreed on the basis of seventy-five per cent of the flow of the stream belonging to white owners for use on lands north of the creek.

Two hundred seventy-five water rights were decreed to two hundred seventeen individual owners, with one hundred nineteen different diversions, affecting some ten thousand acres of land. If the Government should now repudiate its contract all of these rights will be adversely affected, and the cost and effort of the adjudication largely wasted.

No question has been raised, Mr. Secretary, as to the fairness of the original agreement nor the authority of the Secretary to make such agreement, but the area under the Indian diversion has been largely increased, the need for water has grown and now it is proposed on a legal technicality to repudiate a contract in which reliance has been placed for nineteen years. I feel certain that Commissioner Burke is not fully informed or he would never have subscribed to such an order.

I respectfully urge that you advise the proper officials that the contract will be lived up to. If any further information is desired we shall be only too glad to furnish it.

Respectfully submitted,

/s/ R. K. TIFFANY

State Supervisor of Hydraulics.

R. K. Tiffany
E.K.

Plaintiff's Exhibit No. 13-A

Law Offices of
JOHN H. LYNCH
Yakima, Wash.

May 6th, 1929

Dr. Ray Lyman Wilbur,
Secretary of the Interior,
Washington, D. C.

Hon. and Dear Sir:

Re: Ahtanum water agreement.

Under date of June 30, 1908, the Honorable Frank

Pierce, First Assistant Secretary of the Interior, acting in behalf of the U. S. Government and the Department, approved an agreement settling disputed claims and apportioning the water of Ahtanum Creek to the Yakima Indian lands on the one side and to the white settlers' lands on the other. (See copy enclosed). . . .

The overwhelming weight of testimony now, or at any time heretofore, procurable for the purpose of showing the intent of the parties as to whether said contract should be tentative or final would certainly be in favor of finality. Note particularly the wording of the Power of Attorney authorizing the agreement on behalf of the white water users.

It is submitted that an investigation of the conditions existing at the time this agreement was made will disclose the fact that at that time only about 2000 acres, or less, of the Indian land was under cultivation and no considerable extension of irrigation was then deemed possible unless a new source of supply could be found and resorted to. Notwithstanding this fact, however, the white renters and purchasers of the Indian lands have been continually increasing the number of acres under cultivation and irrigation, until now the quantity sought to be served is approximately five thousand acres. At the time the contract was made it was well known that 25% of the natural flow of the Ahtanum stream could not possibly suffice to cover more than 2000 to 2500 acres of the Indian lands, but

despite that knowledge the irrigable acreage has more than doubled, with the result that in most seasons crops are bound to suffer, and there is a disposition on the part of the management of the Indian Canal to hold onto a greater share of the water than the agreement allots to the Indian lands. This is a chronic source of friction and has to be threshed out anew almost every season, until now the Indian Office (or at least its local representatives) are advocating the repudiation and arbitrary disregard of the terms of the agreement. . . . .

May we, therefore ask the intervention of your good offices with a view to having this matter disposed of amicably.

Very respectfully yours,

/s/ JOHN H. LYNCH
Secretary for Ahtanum Irrigation District.

JHL:IM
Encls: 2
CC: Hon. W. L. Jones, U. S. Senate
Hon. C. C. Dill, U. S. Senate
Lester M. Holt, Supervising
Engineer, Yakima, Washington
R. F. Tiffany, State Supervisor
of Hydraulics, Olympia, Washington.

Plaintiff's Exhibit 9 — page 10

Department of the Interior
Office of the Solicitor

Washington, June 7, 1929

The Secretary of the Interior:

Dear Mr. Secretary: In connection with the use of water

for irrigation purposes from Ahtanum Creek, Wash., you have requested my opinion as to the law in the matter based on the facts disclosed by the record at hand. . . . .

It has recently been suggested that there may be some question about the authority of the Secretary of the Interior to thus limit by agreement the rights of the Indians of the Yakima Reservation, particularly in view of decisions by the courts in the cases of Winters v United States (207 U. S. 564) and Conrad Investment Co. vs. United States (161 Fed. 829). Briefly these decisions are to the effect that the establishment of a reservation by agreement with the Indians impliedly reserved to the Indians a prior right to sufficient water for the irrigation of their lands, which right is paramount to that of other appropriators of such water pursuant to State laws.

While fully recognizing the soundness of the doctrine laid down in the cases referred to yet the matter now here turns on a somewhat different situation. In those cases no effort had been made and no action had been taken by this department defining or attempting to define the rights of the Indians in the premises. Section 7 of the general allotment act of February 8, 1887 (24 Stat. 308), expressly authorizes the Secretary of the Interior to prescribe such rules and regulations as he may deem necessary to secure an equitable distribution of water for irrigation purposes within any Indian reservation. Again, as Ahtanum Creek discharges into the Yakima River at

the northern boundary of this Indian reservation, it may seriously be contended that the provision made by Congress in the act of August 1, 1914, supra, directing the Secretary of the Interior to deliver at such northern boundary 720 cubic feet of water per second, was in full satisfaction of the rights of the Indians in and to the low-water flow of both the Yakima River and Ahtanum Creek. This is particularly true in view of the fact that the joint committee of Congress which investigated this matter had full information as to all preexisting agreements and understandings of this kind. It may further be pointed out that the agreement as to the division of water from Ahtanum Creek has stood practically unquestioned for a period of over 20 years and undoubtedly equitable and valuable property rights founded thereon have become established in third parties. According to a familiar rule vested rights thus created can not thereafter be disturbed at least by administrative officers of the Government. Hence, under the circumstances here at hand, I am of the opinion that you would not now be justified in ignoring or attempting to repudiate the agreement entered into in 1908 involving the division of waters of this stream.

In connection wtih this matter I observe from the records at hand several reports from engineers who have investigated this matter indicating that storage may be provided on the upper reaches of Ahtanum Creek, particular attention being invited to the report of September 10, 1920, of L. M. Holt, wherein it was recommended

that a storage project on Ahtanum Creek be undertaken. This may prove a feasible solution of the whole difficulty, particularly if sufficient storage can be made available for the lands in both Indian and white ownership, it appearing that the annual run-off of the Ahtnum watershed is around 70,000 acre-feet, which is ample for the irrigation of upwards of 17,000 acres of land.

Respectfully,

E. C. FINNEY, Solicitor.

JOS. M. DIXON,
First Assitant Secretary.

Approved June 7, 1929

Plaintiff's Exhibit 11-63

Law Offices of
JOHN H. LYNCH
Yakima, Wash.

June 24, 1929

Dr. Ray Lyman Wilbur,
Secretary of the Interior,
Washington, D. C.

My dear Dr. Wilbur:

Re: Ahtanum Creek Agreement

I beg to acknowledge a letter from your office signed by the Hon. Joseph M. Dickson, acting secretary, dated June 18th, 1929, with reference to the decision of the Department in regard to the division of the waters of the Ahtanum Creek between the Yakima Indian Reservation on the one hand, and the white settlers on the other. Our

people are very glad, indeed, to have a final disposition of this matter by the Department ,abiding by the compromise of May 9th, 1908.

The white settlers involved and the officers of the Ahtanum Irrigation District, having charge of the distribution of this water, are very grateful and appreciative for the prompt and efficient manner in which your office has handled this rather unpleasant subject. On behalf of these water users and officers of said organization, I beg to assure you that an earnest endeavor will be made on their and our part to comply with the spirit, as well as the letter, of said agreement. As heretofore mentioned, we shall continue to cooperate with the officers of the Indian Reclamation Project in the matter of a reasonable rotation of these waters at such times as the whole supply awarded to the whites shall not be actually necessary for their use. And if the Indian representatives will reciprocate in like manner, I believe that the waters of the stream can be more extensively used, to the advantage of both parties.

With a view to getting this cooperation idea more thoroughly into the minds of the individual water users, I am handing a letter to the local press, a copy of which I enclose herewith.

Again thanking you and your associates and assistants for the courtesy and consideration given, I beg to remain,

Very truly yours,

/s/ JOHN H. LYNCH
Secretary for Ahtanum Irrigation District.

JHL-M
Enc.

Plaintiff's Exhibit 11-89

QUINTON, CODE and HILL
MEMBERS
AMERICAN SOCIETY OF CIVIL ENGINEERS
SUITE 712, STANDARD OIL BUILDING
TENTH STREET AT HOPE STREET
LOS ANGELES, CALIFORNIA

September 9, 1929

Mr. R. F. Tiffany,
Supervisor of Hydraulics,
Olympia, Washington.

Dear Mr. Tiffany:

Your letter of May 9th was found on my desk when I returned from quite an extensive trip, made chiefly for the benefit of my health. I hope our next trip in our own country will take us to the Northwest, as both Mrs. Code and myself are very fond of that part of the country.

You asked me if the memorandum of agreement executed on May 9th, 1908 between the writer, acting under the authority of the Secretary of the Interior, and the legal representatives of the white water users on the north side of the Ahtanum was intended to be permanent. It was certainly my understanding and belief that the agreement was to be a final one and intended to settle for all time

the question of the respective rights of the whites and Indians to the waters of the said creek.

Without access to data on which the agreement was predicated, I cannot, of course, attempt to enter into a detailed discussion of the various factors considered in negotiating that agreement which is now over twenty years old.

I felt at the time and still feel that the contract was as fair a one as could be obtained for the Indians, and recall distinctly that it required much hard work to secure the consent of the north side water users to the quotas finally decided upon. They believed that the extent of beneficial use of water on Indian lands at that date did not warrant the surrender of so large a percentage of the flow.

If the doctrine of prior appropriation and beneficial use is considered as applying in this instance, am confident that the records would show that the Indian lands had been more than fairly treated. I hope, however, that the Government can find means either through storage somewhere, or perhaps by underground water development, to augment the supply for the Indian lands on the south side of the creek.

With sincere regards,

Very truly yours,
W. H. CODE

WMC:LH

Plaintiff's Exhibit 11-70

5-1143
DEPARTMENT OF THE INTERIOR
UNITED STATES INDIAN IRRIGATION SERVICE
SUPERVISING ENGINEER

Yakima, Washington
August 2, 1930

Commissioner of Indian Affairs
Washington, D. C.

Dear Sir:

* * * *

I made note of the gage at the Cipoletti weir at the head, but did not have access to a table until Sunday morning. I found then that we were getting more than twelve second feet of the 28.8 second feet in the Creek. I got in touch with Mr. Redman over the telephone and instructed him to cut our diversions down to 25% as called for in the Agreement of 1908. Since that time the Indian Canal has been getting its 7.2 second feet of water. . . . .

Yours very truly,

/s/ L. M. HOLT
Supervising Engineer

LMH:L

Plaintiff's Exhibit 11-71

AHTANUM IRRIGATION DISTRICT
Yakima, Washington
August 9th, 1930

Directors	Officers
C. H. Brooks	C. H. Brooks, President

Merle Carson
Wm. Greenwalt

John H. Lynch, Secretary

The Honorable,
The Secretary of the Interior,
Washington, D. C.

Dear Mr. Secretary:

Re: Ahtanum Creek,
Washington.

Owing to the nature of the controversy, and for the reasons hereinafter mentioned and referred to, it is the desire of the writer that the matter in hand be referred to and considered by the Honorable Secretary himself, or the acting head of the Department.

Reference is respectfully made to the following documents:

1. The letter of the undersigned addressed to the Honorable Secretary, dated May 6, 1929.

2. The Honorable Secretary's letter of May 23, 1929, addressed to the undersigned.

3. Departmental letter of June 18, 1929, addressed to the undersigned, and signed by the Hon. Jos. M. Dixon, acting secretary.

4. Departmental letter of June 19, 1929, addressed to the undersigned and signed by the Hon. E. K. Burlew, administrative assistant. Also the inclosed report of the Honorable Solicitor of the Department, dated and approved the 7th day of June, 1929.

As will appear from the above references, the Department after considering the law and the facts, decided

to abide by the compromise agreement and settlement of May 9, 1908, apportioning the waters of the Ahtanum Creek one-fourth to the lands on the Yakima Indian Reservation, and three-fourths to land of white owners situate north of said creek. . . .

Very respectfully yours,

/s/ JOHN H. LYNCH
Secretary and attorney for
Ahtanum Irrigation District.

JHL:IM

cc: Hon. W. L. Jones, U. S. Senate
Hon. C. C. Dill, U. S. Senate
Hon. John W. Summers, M. C.

Plaintiff's Exhibit 9 — page 6

DEPARTMENT OF THE INTERIOR
OFFICE OF THE SOLICITOR

Washington

March 18, 1931

The Secretary of the Interior.

My dear Mr. Secretary:

You have submitted to me for opinion certain questions propounded by the Commissioner of Indian Affairs relative to the water rights on Ahtanum Creek, a stream forming the northerly boundary of the Yakima Indian Reservation in the State of Washington. The questions submitted are as follows:

1. Whether certain old Indian rights to the use of water from the south fork of Ahtanum Creek were taken into consideration when the agreement of 1908 was made.

2. Whether the division of the water on the basis of 75-25 in the agreement of 1908 was without limitation as to time of use throughout the season or was confined to the period of low water usually beginning about the middle of June.

3. Whether the parties representing the Government had authority to bind and limit the use of water upon the Yakima Indian Reservation along the lines set forth in the agreement of 1908. . . .

In question No. 3 we are presented with greater difficulties, as it involves the treaty rights of the Indians and also the right of the Secretary of the Interior to make a contract for and on behalf of the Indians which would limit their rights to the diversion of the waters of Ahtanum Creek, which is the northerly boundary of the reservation. From the portion of the treaty previously quoted it is shown that the boundary is fixed as commencing on the Yakima River thence proceeding westerly along said Ahtanum River to the forks. These words give little information as to whether the boundary line was the thread of the stream or whether it would be on the north or the south bank of the stream. The land on the northbank of Ahtanum Creek and west of the Yakima River was surveyed July 14, 1864. This survey was by meander lines along the north bank of the creek. The survey of lands on the south bank of the stream lying west of the Yakima River, which is on the present Indian reservation, was made February 7, 1893. This line was also meandered. There was no attempt to establish a line in the bed of the stream. It might be asserted that the meander line on

the south bank was all that represented the boundary of the Indian reservation because that would be land within the limits of the area described in section 2 of the treaty of 1855. The Supreme Court of the United States in the case of Oklahoma v. Texas (256 U. S. 90) would not give such a narrow interpretation to the words used. Further, the Supreme Court decisions lead to the conclusion that where a stream marks the boundary between sovereignties, the thread of the stream is the line which represents the division of authority.

The records in the Indian Office indicate that a dispute arose in 1907 relating to the division and use of waters from Ahtanum Creek and that arrangements were made that year looking to the institution of a suit to determine the rights of the parties. After negotiations had been carried on for some time the contract of May 9, 1908 was involved which divided the waters as above explained. At that time the case of Winters v. United States, supra, was pending in the courts and after the decision was rendered by the Supreme Court of the United States it was contended that the Secretary of the Interior had by such contract deprived the Indians on the reservation of some of their rights by entering into the agreement of May 9, 1908.

In the case of Winters v. United States the conditions are, in my opinion, different than those presented by the conditions existing at the time the treaty was made in

1855 with the Yakima Indians. In the Winters case the court was considering a treaty made May 1, 1888 (25 Stat. 113). It described the boundary of the reservation as beginning at a point in the middle of the channel of Milk River opposite the mouth of Snake Creek; thence due south to a point . . . thence due east . . . thence following the southern crest of said mountains . . . thence in a northerly direction to a point in the middle of the main channel of Milk River opposite the mouth of Peoples Creek; thence up Milk Creek in the middle of the main channel thereof to the place of beginning. . . .

At the time the treaty was made in 1888 irrigation had been practiced in Montana, where this reservation was located, for 20 or 30 years. At the time the treaty was made with the Yakima Indians in 1855 irrigation was practically unknown in the United States except for some areas irrigated by the Mormons in Utah beginning in 1847 and for some irrigation in California. There was evidently no intention of the parties to the treaty of 1855 to consider the question of the use or division of title to the waters of Ahtanum Creek.

Assuming that the treaty did not decide the rights to the waters of Ahtanum Creek but that the people living along the stream might appropriate and use the waters, we find that a dispute arose, and in 1907 it was agreed that the water should be divided on the basis of 25 per cent to the lands on the south side of the stream and 75 per

cent to the lands on the north side of the stream when it became necessary to divide the waters. It is asserted in the record in the Indian Office that this division was based upon the determination that at that time 4500 acres were irrigated by whites on the north side of the stream and 1500 acres on the south side of the stream. In other words, it was a division of the waters based upon beneficial use at the time the agreement was made. With these facts in view, does the Secretary of the Interior have authority to make a contract which would limit the use of water to the Indian Lands on the reservation? Water used for irrigation purposes is an appurtenance to the land on which it is used. In this respect it can be considered real estate, and the rules of law regarding real property should be applied in determining the rights of the parties. To dispose of some of the water in the boundary stream of the reservation by sale or otherwise involves the right of the Secretary of the Interior to dispose of the property of the Indians of a reservation. . . .

The authority of the Secretary of the Interior attempted to be exercised in this instance has reference to a treaty between the United States and an Indian tribe, and there is considerable doubt in my mind whether he has authority to divest the tribe of any of the rights in real property held by the Indians. It has been held by me in two decisions that the contract of May 9, 1908, should not be abrogated by the United States because it has been in force for more than 20 years and valuable

rights have been acquired by acting upon the terms of the agreement. This is evidenced by the decree by Judge Nichoson in the Supreme Court of the State of Washington in and for Yakima County May 7, 1925, wherein he adjudicated and determined the water rights of the landowners on the north bank of Ahtanum Creek and settled the priority rights of such landowners. The rights of the Indians and of the whites have been established and grown for over 20 years on the basis of the agreement of May 9, 1908, and it is my opinion that the rights should not be disturbed by an abrogation of the agreement on the theory that the Secretary of the Interior did not have authority to make the agreement for the Indians.

Very truly yours,

E. C. FINNEY, Solicitor.

Jos. M. Dixon,
First Assistant Secretary.

Approved March 18, 1931

Plaintiff's Exhibit 9 — page 30

STATEMENT OF EDWARD C. FINNEY

MR. FINNEY. Mr. Chiarman. I am not here to advocate the passage of this bill or to oppose the passage of the bill. I understand I am here at the request of the committee and probably because during the last two or three years I, as solicitor for the department, have rendered three opinions which, among other things, advised the Secretary of the Interior that this agreement is valid

and should be adhered to. Without taking too much time in backtracking, I would like to give a few facts in order to orient myself. . . .

In the Milk River case, the treaty specifically provided that the boundary should be the middle of the channel of Milk River and that fact was commented on both by the United States District Court and by the Supreme Court in discussing the so-called Winters case and which I assume had some bearing on their decision. I do not believe that the District Court of the United States or even the Supreme Court—this is my opinion only—went as far as has been contended by some of our friends in the Indian Office. It is true there is a general principle laid down in the case, but the court is very careful to say and both courts:

> We are of the opinion when all of the facts, circumstances and conditions, and surroundings of the Indians at the time the treaty was entered into are considered, it can not be judicially said no portion of the water of Milk River was reserved by the terms of the treaty for the use and benefit of the Indians residing upon the reservation.

That is Federal Reporter, 143, page 745.

MR. FINNEY. They did, but they did not hold that the Indians were entitled to all the water of the Milk River. The Indians never got all the water of Milk River. They got approximately 50 per cent. It is my view, whether right or wrong, there being water there which might be taken and used by the Indians and by the whites,

that in 1906 this controversy arose and in settlement of the controversy the representatives of the Indians, the Secretary, and the whites, made this contract, and they divided it at that time approximately according to the acreage which was being irrigated. At that time there was some 1,223 acres being irrigated of Indian lands and some 4,600 acres being irrigated on the outside of the reservation boundaries, so that the division was based largely upon the use at that time being made of the water.

That agreement was entered into and no controversy arose until a dry season came or until the latter part of an irrigation season, when a shortage of water occurred and then people began to question the agreement. In the meantime the whole Yakima country had gotten into a controversy as to the rights of the Indians, the water, and so forth, and a congressional commission went out there in 1913 and made a report from which I think the chairman read a few minutes ago, Senate Document 337 Sixty-third Congress, second session. As a result of that, Congress passed an act in 1914 in which they allotted certain water from the Yakima River for the benefit of the Indians. They said they had been unjustly deprived of a part of the natural flow of the Yakima River and directed the Secretary of the Interior to deliver at the north boundary of the reservation sufficient water in additon to 147 cubic feet per second previously allotted to the Indians to give the Indians during the whole water-irrigation season at least 720 cubic feet per second,

this quantity being considered equivalent to any satisfaction of the rights of the Indians in the low-water flow of the Yakima River and adequate for the irrigation of 40 acres on each Indian allotment. In my opinion I say it might be argued that this was in satisfaction of the rights of the Indians. It is true this committee did not consider during this investigation the matter of Ahtanum Creek but they certainly knew that this agreement had been made. They knew there had been a controversy over the water and they knew that Ahtanum Creek was a tributary of the Yakima. . . . .

Plaintiff's Exhibit No. 11-79

WESTERN UNION

Received at 708 14th St., N. W. Washington, D. C.
1931 Apr 10 PM 8

CC984 57 NL GOVT COLLECT – YAKIMA WASH 10

COMMISSIONER OF INDIAN AFFAIRS–
WASHINGTON DC–

PLEASE ADVISE IF WE SHOULD CUT DOWN TO TWENTY FIVE PER CENT OF THE FLOW OF AHTANUM CREEK PRIOR TO LOW WATER FLOW PERIOD STOP WHITE WATER USERS DEMAND THAT DIVERSION BE REDUCED IN ACCORDANCE WITH THEIR CONSTRUCTION OF THE AGREEMENT OF NINETEEN EIGHT IMMEDIATE DECISION NECESSARY FOR DIVERSION PENDING

FINAL OPINION AS TO CONSTRUCTION OF AGREEMENT —

HOLT

Western Union
Day

Indian
Gen. Exp. Ind. Ser. 1931
Washington, D. C. April 11, 1931

Holt, Supervising Engineer,
Indian Irrigation Service,
Yakima, Washington.

Retel tenth. See pages four to seven inclusive of copy of opinion by Solicitor approved March eighteen amending in part opinion May twenty-four nineteen hundred thirty dealing with division Ahtanum water and pending final action by attorney general proceeding compliance therewith.

(Signed) C. J. Rhoads
RHOADS

Approved:
Apr. 13, 1931
(Sgd) Dixon
First Assistant Secretary

Irrigation
18955-23
21597-31
S J F — mes

Copy to H. V. Clotts.

Plaintiff's Exhibit No. 11-101

10
H. R. 10351
Mar 22 1932

AHTANUM
MEMORANDUM FOR THE SECRETARY

This is in reference to a letter addressed to you from Hon. Robert S. Hall, Chairman of the Committee on Irrigation and Reclamation, House of Representatives, with which he transmitted a copy of H. R. 10351 (72d Congress, 1st sess.) for your consideration and report. . . . .

With a view to arriving at a working understanding of the matter, what is known as a Memorandum Agreement was drawn up as of date May 9, 1908, in connection with which the Government was represented by Mr. W. H. Code, at that time Chief Engineer of Irrigation for the Indian Service, and water users were represented by W. W. Glidden, Mary J. Glidden, his wife, and others as named in the proposed legislation. Based upon the facts as they then existed, it was agreed to divide the waters of Ahtanum Creek so as to permit the Indian lands of the reservation to receive 25 per cent of the normal flow and the white settlers north of the creek to receive 75 per cent of the normal flow. That adjudication approximately represented the proportionate acreage of the lands irrigated from the creek at that time. That is to say the area of white-owned land was at that time approximately three times as large as the area of Indian reservation land depending upon Ahtanum Creek for water supply.

Special attention is invited to the fact that this agreement, a copy of which is attached, is entitled "Memoran-

dum of Agreement," and it has been the consistent contention of the Indian Service that such agreement was entered into merely as a working understanding to meet the conditions as they existed at that time, and was not necessarily intended to be a binding agreement at such future time as the conditions should be radically changed. During the years intervening since the execution of the agreement, the area or irrigated Indian lands within the reservation depending upon Ahtanum Creek for water supply, has greatly increased. This increase in acreage being to such an extent that 25 per cent of the normal flow of the creek is altogether inadequate for successful crop growing during the later months of the irrigation season. It is further contended that in accordance with principles well established by decisions of the courts, the Indian reservation lands are entitled to a larger portion of the flow of the stream if such additional water is needed to irrigate the lands. . . .

It is clearly evident, it is believed, that the provisions of the agreement under consideration do not adequately cover the situation as it now exists either as to the major point of the division of the water or as to the numerous operations involved in the four features above outlined. It is for this reason that the Indian Service insists upon the importance of a final determination of the matter by the court by consent decree or otherwise. If, in the meantime the agreement of 1908 which we believe has so clearly been shown to be inadequate, should

be confirmed by an act of Congress, it would, to say the least, considerably prejudice the case against the interests of the Indians if it should come into court for final action.

It is respectfully recommended, therefore, that H. R. 10351 (72d Cong., 1st Sess.) do not receive favorable consideration.

C. J. RHOADS
Commissioner.

3 ELM 19

Plaintiff's Exhibit No. 11-102

THE SECRETARY OF THE INTERIOR
WASHINGTON

Mar 23 1932

Department of the Interior
Washington
Copy for Information of
Indian Office AHTANUM

Hon. Lynn J. Frazier,
Chairman, Committee on Indian Affairs,
United States Senate.

My dear Mr. Chairman:

I have your request for report of March 18, 1932, on S. 3998, a bill approving and confirming the contract for apportionment of the waters of Ahtanum Creek, Washington, dated May 9, 1908.

The records of the department show that the agreement in question was approved after a long period of negotiation between the officers of the department and

the white settlers on the north side of Ahtanum Creek. In 1907, faced with a suit in equity to enjoin the use of waters of that creek, except as to those who had a right thereto equal or prior to the reservation, the white settlers were prevailed upon to enter into a compromise to avoid litigation. During the course of the negotiations, the Indian Service claimed a division of the water on the basis of two-thirds to the whites and one-third to the Indians. The then Acting Commissioner of Indian Affairs, on October 25, 1907, addressed a communication to the Secretary of the Interior setting up the status of the negotiations, in which he made the following statement:

> "In the event of failure of negotiations on this basis I should be willing to accept a division based on the exact acreage now irrigated on the respective sides of the creek, but the one and two-thirds basis should first be pressed to the limit."

This letter was approved by the Acting Secretary of the Interior on October 26, 1907.

On January 29, 1908, the Secretary of the Interior addressed H. J. Snively, North Yakima, Washington, as follows:

* * * * * *

As result of further negotiations an agreement was entered into on June 30, 1908, between the water users and the department, dividing the water on the basis of 75 per cent to white settlers and 25 per cent to Indian settlers. A copy of the agreement is inclosed herewith.

The Indian Service now, after twenty-four years, claims that due to the increased acreage of Indian lands under irrigation, twenty-five per cent of the normal flow of the creek, which is the division embodied in the agreement, is inadequate for successful crop raising during the latter months of the irrigating season, and an effort was made by field representatives of the service in the fall of 1931 to negotiate a new agreement with the white water users who were represented by the officers of their irrigation district. This tentative agreement was repudiated by resolution of the water users themselves on February 29, 1932. The agreemnt was to cover only the season of 1932 but was to be used as a basis for a consent decree at a later date.

Since this action by the water users, the only basis for dividing the waters is under the 1908 agreement; but the authority of the Secretary of the Interior to enter into an agreement of this nature has been questioned, which has the effect of casting doubt upon the validity of the 1908 agreement.

The evident purpose fo S. 3998 is to validate and confirm the agreement of 1908, and thus afford a basis for definite future construction of disputes arising under the agreement. These questions relate to the interpretation of the agreement rather than to its validity, and may be set out as follows:

1. Whether the provisions in the agreement of 1908

for the diversion of water are effective throughout the entire year or only through the low water season.

2. Whether the waters of the South Fork of Ahtanum Creek before its junction with the main stream are at all subject to the agreement of 1908.

3. Whether natural channels of small tributaries of the creek may be used for diverting water under the agreement of 1908 instead of propertly constructed canals.

4. The question of appointing the watermasters, and the construction of necessary head gates and the payment of the salaries and expenses in connection therewith.

These questions can be settled either by agreement or in court after the enactment of the legislation. I have been informed that the white water users are agreeable to seeking an interpretation of the agreement in the courts.

It may be that ultimately the irrigation needs of both the white settlers and the Indians will require and justify the construction of a storage reservoir on the upper reaches of Ahtanum Creek or the construction of a pumping system to supplement the water supply of these lands.

During the twenty-four years that have elapsed, undoubtedly equitable and valid property rights founded upon the 1908 agreement have been established in third parties, and according to a familiar rule of law, vested rights thus created cannot be disturbed by administrative

officers of the Government. Unless I am prevented by court action, I propose to adhere to the agreement of 1908. I, therefore, have no objection to the enactment of this legislation which I believe will be one step in the final settlement of a dispute running over many years.

Very truly yours,

(Sgd.) RAY LYMAN WILBUR
Secretary.

Enclosure 2786

(A duplicate of the above letter, being Exhibit 11-100 withdrawn was sent to Congressman Robert S. Hall, Chairman of the Committee on Irrigation and Reclamation of the House of Representatives, dated March 22, 1932.)

APPENDIX C
IN THE UNITED STATES
COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Appellant* vs. AHTANUM IRRIGATION DISTRICT, et al., *Appellees.*	No. 14714 AFFIDAVIT OF CHARLES L. POWELL

STATE OF WASHINGTON }
County of Benton. } ss.

CHARLES L. POWELL, being first duly sworn, on oath deposes and says:

That he is one of the attorneys for the appellee, Ahtanum Irrigation District, a public corporation. That he and his associate Fred C. Palmer have been recently requested by the Ahtanum Irrigation District to obtain an injunction pending appeal to preserve the status quo of the respective parties and to maintain pending this appeal the division of the flow of Ahtanum Creek during the irrigation seasons hereafter and until the final decision in this appeal as determined and adjudged by the United States Circuit Judge James Alger Fee, the Trial Judge of this case.

That the motion is based upon the record on appeal in this cause and upon the affidavits attached. The affiant

alleges that in the trial of this cause it was determined that an agreement of May 9, 1908, was a valid and binding agreement under which the flow of Ahtanum Creek was divided between the appellant, United States of America, acting in behalf of its Indian wards, and the landowners, who are the predecessors in interest to the appellees in this cause, the appellant to receive 25% of the flow of Ahtanum Creek and the predecessors of the appellees to receive 75% of the flow of Ahtanum Creek.

That subsequently and in the year 1926 the State of Washington, which then had jurisdiction over the waters of Ahtanum Creek, adjudicated all of the claims of the landowners on the north side of Ahtanum Creek to 75% of the flow of Ahtanum Creek, which proceeding was binding upon the United States of America, the appellant herein, and the Trial Court has held that such adjudication barred any claim by the appellant to that portion of the flow of Ahtanum Creek (R. 165).

That affiant is informed and believes and therefore alleges the fact to be that pending the trial of this cause no application was made for an injunction for the reason that the flow of Ahtanum Creek was abnormally high during the entire irrigation seasons involved.

That there is no storage on Ahtanum Creek and no place for adequate storage. That the flood waters in the spring and early summer furnish an adequate supply of water for all landowners and users but that during the

months of July, August and September there was in the season of 1955, and there is threatened to be in the season of 1956, a distinct shortage of water, which would result in irreparable damage and injury to the landowners in the Ahtanum Irrigation District.

That it is impossible to measure damages resulting from the withholding of irrigation water from irrigated farms for the reason that the difference in value of the crops is impossible to exact measurement and determination; that there is no plain, speedy and adequate remedy at law for this appellee or for any of the private individuals, appellees in this cause.

That unless an order is entered preserving the status quo and enjoining the appellant from interfering with the portion of the flow of Ahtanum Creek set aside to appellees, irreparable damage and injury may occur.

That all of the parties are before this Court and that application has been made for an injunction pending appeal to the United States District Court, for the Eastern District of Washington, Southern Division, which application was made by petition and an order requiring appearance and answer. That at the hearing on December 30, 1955, before the Honorable William J. Lindberg, United States District Judge, the Court granted a motion to dismiss the petition on the ground and for the sole reason that the District Court had no jurisdicion of the cause, it having been divested of said jurisdiction by the appeal.

That this Honorable Court should entertain this petition based solely upon the records in this cause, or in the alternative should by appropriate order, without changing the status of the parties on appeal, authorize and direct the United States District Court, for the Easatern District of Washington, Southern Division, to take evidence pursuant to the petition concerning the necessity for the preservation of the status quo of the respective parties to this appeal until it is finally determined.

That the method of procedure outlined and requested in this motion will avoid a multiplicity of suits, will enable this Court to adjudicate and settle all matters between the parties in this one cause, will provide an orderly procedure for determination of the rights of the respective parties and will enable the Court to proceed to a final adjudication without changing the status of the parties pending the appeal.

WHEREFORE, affiant respectfully prays that the motion for injunction pending appeal be granted and that an injunction be issued pending appeal directed to the appellant, enjoining the appellant from interfering with 75% of the flow of Ahtanum Creek, to which the appellees are entitled, and enjoining it from taking more than 25% of the flow of Ahtanum Creek at any time during the irrigation season of 1956, or thereafter until this appeal is determined, or in the alternative that the cause be remanded to the District Court solely for the purpose of

taking additional testimony on the necessity for the issuance of said injunction pending the appeal and the threatened irreparable damage and injury to the appellees.

Charles L. Powell

Subscribed and sworn to before me this 3rd day of January, 1956.

Floyce Paulson,
Notary Public in and for the State of Washington, residing at Kennewick.

IN THE UNITED STATES
COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Appellant*	
vs.	No. 14714
AHTANUM IRRIGATION DISTRICT, et al, *Appellees.*	AFFIDAVIT OF FRED C. PALMER

STATE OF WASHINGTON }
County of Yakima. } ss.

FRED C. PALMER, being first duly sworn, on oath deposes and says:

That he is one of the attorneys retained by the appellee, Ahtanum Irrigation District, and makes this affidavit in support of appellee's motion for an injunction pending the appeal of the above captioned case.

That during the irrigation season of 1955, particularly during the months of July, August and September and commencing with July 19, 1955, the Water Master for the Wapato Project, United States Indian Service, with headquarters located in Wapato, Washington, diverted water for the benefit of the lands lying south of Ahtanum Creek greatly in excess of the amount allocated to such lands in the 1908 agreement and greatly in excess of that adjudicated as belonging to the lands lying south of Ahtanum Creek in accordance with the findings of

fact and conclusions of law entered by the Hon. James Alger Fee in the above captioned case when he was sitting as a District Judge in said case on November 9, 1954.

That the dates, amounts and percentages of diversion were as follows:

Date	return flow including Total flow	U.S.I.S. Diversion by	Diversion Percentage of
July 19, 1955	67.4 cfs.	31.5 cfs.	46.7%
July 26, 1955	50.1 cfs.	27.4 cfs.	54.7%
August 2, 1955	42.3 cfs.	17.1 cfs.	40.4%
August 4, 1955	42.7 cfs.	17.5 cfs.	41. %
August 9, 1955	38.2 cfs.	14.9 cfs.	39. %
August 16, 1955	36.9 cfs.	13.7 cfs.	38. %
August 23, 1955	33.9 cfs.	12.9 cfs.	38. %
August 30, 1955	32. cfs.	10.7 cfs.	34. %
September 8, 1955	30. cfs.	10. cfs.	33.3%

That as can be seen, there is considerable variance in the diversions made by the United States Indian Service, but that all of said diversions were substantially in excess of the 25% adjudicated in the District Court as belonging to the lands lying south of Ahtanum Creek; that because of such excess diversions, the lands lying north of the Ahtanum Creek were very short of water and many crops dried up and were lost as a result thereof; that the farmers owning land lying to the north of said creek suffered irreparable injury during the 1955 irrigation season and the excess diversions by the Indian Service, in the opinion of your affiant, will undoubtedly continue during the 1956 irrigation season unless the decree and judgment of the District Court is implemented by an in-

junction limiting the lands lying south of Ahtanum Creek to 25% of the flow during the 1956 irrigation season, and thereafter until the further order of this court.

WHEREFORE, your affiant respectfully moves that appellee's motion for an injunction be granted as prayed for.

FRED C. PALMER

Subscribed and sworn to before me this third day of January, 1956.

ELERY A. VAN DIEST
Notary Public in and for the State of Washington, residing at Yakima, Wash.

IN THE UNITED STATES
COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Appellant* vs. AHTANUM IRRIGATION DISTRICT, et al, *Appellees.*	No. 14714 AFFIDAVIT OF CHARLES L. POWELL

STATE OF WASHINGTON }
County of Yakima. } ss.

CHARLES L. POWELL, being first duly sworn, on oath deposes and says:

That he is one of the attorneys for the appellees in the above entitled action and makes this affidavit in support of the motion for injunction now pending in this court.

That there is attached hereto marked Exhibit "A" and made a part hereof a certified copy of a report by the Water Master of Yakima County, State of Washington, to the Supervisor of the Division of Water Resources of the State of Washington showing the diversion of waters from the Ahtanum Creek during the year of 1955 and the relationship between the diversions of the Ahtanum Irrigation District representing the landowners on the north side of the Creek and the United States Indian Service representing the Yakima Reservation water users.

CHARLES L. POWELL

Subscribed and sworn to before me this fourteenth day of February, 1956.

M. C. DELLE
NOTARY PUBLIC in and for the State of Washington, residing at Yakima, Washington

January 12, 1956

Mr. M. G. Walker, Supervisor
Division of Water Resources
Transportation Building
Olympia, Washington

Re: Ahtanum Irrigation District

Dear Mr. Walker:

The weekly reports for the 57 days (July 19th to September 13th inclusive) last year that periodic checks were made of the flows are summarized on the attached tabulation.

Further comparisons of acre feet per acre diversions to other areas during the same period are as follows:

Projects	Total Ac. Ft.	Area Irrigated	Ac. Ft. Per Acre
U.S.I.S. Ahtanum Ditch	2,066	4,800 Acres	0.43
Ahtanum Irr. Dist.	2,838	10,000 Acres	0.28
US-BR Roza Div.	109,025	67,637 Acres	1.61
Sunnyside Valley Irr. Dist.	140,509	99,993 Acres	1.41
U.S.I.S. Wapato Project	194,271	123,748 Acres	1.57

The above data on the last three projects is from the U. S. Bureau of Reclamation, Yakima office, which has just completed checking the records through the period in

question. On the Roza and Sunnyside Projects there is little recovery and reuse of water. The Wapato Project recovers and reuses a substantial part of its river diversions. Diversions are used here since the basis of comparison is similar in the attached data.

Using the Ahtanum Irrigation District as a base, since it is the lowest, we have the following comparisons:

Project	Ac. Ft./AC	Comparisons
Ahtanum Irr. Dist.	0.28	1.00
U.S.I.S. Ahtanum Ditch	0.43	1.54
Sunnyside	1.41	5.04
Wapato	1.57	5.60
Roza	1.61	5.75

There is of course, recovery and reuse by the Ahtanum water users, but the above flows to the Wapato do not include any use made of the Satus and Toppenish creek flows which are considerable at times during the irrigation season.

The foregoing comparisons show that where water was available by reason of storage other areas used 5.04 to 5.75 times the water the Ahtanum Irrigation District received during the 57 days of record here reviewed. In view of the very low acre feet per acre the Ahtanum District received it is difficult to understand how the Government attorneys conclude there is "wanton" and "unconscionable" waste of water on the north side of the creek.*

There has been waste water along the roads at intervals but that is not confined to the north side. You will note

the return flow over the 4-foot weir was estimated on two occasions in August. At those times the waste water over the access lane was sufficient to cause doubt as to getting back up to the county road if I drove down to the weir. The road and lane are on the reservation side of the creek.

Yours very truly,

G. D. Hall
Water Master
Yakima County

*See letters and Brief No. 14714 Ninth Circuit U. S. Court of Appeals.

GDH/rw

cc: Mr. Ray N. West
Mr. Fred C. Palmer
Mr. Chas. H. Powell

Date	Flows in CFS S. Fk.	N. Fk.	4' Weir	Total CFS	Totals Ac.ft/D	Ac.ft./wk	USIS Divers. 4'weir	8'weir	CFS	Totals Ac.ft./D	Ac.Ft./Wk	Remarks
July 19	13.4	49.5	4.5	67.4	133.6		4.5	24.9	29.4	58.3		
	Av. & Totals				116.5	815.5				56.3	394.1	
July	11.0	36.0	3.1	50.1	99.3		3.1	24.3	27.4	54.3		
	Av. & Totals				91.6	641.2				54.2	379.4	
Aug. 2	9.9	30.0	2.4*	42.3	83.9		2.4*	24.9	27.3	54.1		Flow at 11:00 A. M.
	Av. & Totals				84.3	590.1	2.4*	14.7	17.1	33.9	238.7	Cut at 11:55 A. M.
Aug. 4	9.9	30.0	2.8	42.7	84.7		2.8	14.7	17.5	34.7		Recheck
	Av. & Totals				80.2	561.4				32.1	224.7	
Aug. 9	8.9	26.7	2.6*	38.2	75.8		2.6*	12.3	14.9	29.5		
	Av. & Totals				74.5	521.5				28.3	198.1	
Aug. 16	7.6	27.3	2.0	36.9	73.2		2.0	11.8	13.7	27.2		
	Av. & Totals				70.2	491.4				26.4	184.8	
Aug. 23	7.2	25.5	1.2	33.9	67.2		1.2	11.7	12.9	25.6		
	Av. & Totals				65.4	457.8				23.4	163.8	
Aug. 30	6.8	24.0	1.2	32.0	63.5		1.2	9.5	10.7	21.2		
	Av. & Totals				61.5	430.5				20.5	143.5	
Sept. 6	6.2	23.0	0.8	30.0	59.5		0.8	9.2	10.0	19.8		
	Av. & Totals				56.5	395.5				19.9	139.3	
Sept. 13	6.4	20.0	0.6*	27.0	53.5		0.6*	9.5	10.1	20.0		

Totals for Period	4,904.9 Ac. Ft.	2,066.4 Ac. Ft.
Less U.S.I.S. Diversions	2,066.4 Ac.Ft.	
Total to Ahtanum Irr. Dist.	2,838.5 Ac.Ft.	

°Relative diversions — 0.28 Ac. Ft./AC—Ahtanum District — 0.43 Ac. Ft./AC U.S.I.S.

Rights under 1908 Agreement	3,678.7 Ac. Ft. to Irr. Dist.	1,226.2 Ac. Ft. to U.S.I.S.
Distrit was short in above period	8.40.2 Ac. Ft.	U.S.I.S. was over 840.2 Ac. Ft.

°No readings — Estimated °Ahtanum Irr. Dist. 10,000 Acres °U.S.I.S. cropped area 4,800 Acres

This is to certify that the attached is a true and exact copy of the letter of January 12, 1956 from G. D. Hall, Watermaster of Yakima County, as contained in the files of Ahtanum Creek of which we have custody.

Dated this 1st day of February, 1956 at Olympia, Washington.

/s/ M. G. WALKER
M. G. WALKER, Supervisor
DIVISION OF WATER RESOURCES

Subscribed and sworn to before me this 1st day of February, 1956.

/s/ MARIE STRUCK
Notary Public in and for the State of Washington residing at Olympia.